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No. 11514

United States
Circuit Court of Appeals
For the Ninth Circuit.

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent,
and
INTERNATIONAL CHEMICAL WORKERS UNION, A.F.L.,
et al.,
Intervenors,
and
WAREHOUSE UNION LOCAL 6, INTERNATIONAL
LONGSHOREMEN'S & WAREHOUSEMEN'S UNION
(CIO),
Intervenor,
and
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
COLGATE-PALMOLIVE-PEET COMPANY,
Respondent.

Transcript of Record
In Three Volumes
Volume III
Pages 667 to 987

Upon Petition for Review, and Petition to Enforce Order
of the National Labor Relations Board.

PAUL P. O'BRIEN,
CLERK

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(Testimony of Clifford A. Altman.)

Q. Would it have been in my office last Thursday? A. That was the place.

Q. All right, sir. At what time do you usually arrive at work, Mr. Altman?

A. Around seven-fifteen in the morning.

Q. On July 30 did you arrive at your office about that time? A. Yes, sir.

Q. Did anything unusual occur during the course of the day?

A. In the afternoon something unusual occurred, yes, sir.

Q. Could you place the time?

A. Around 1:45.

Q. Will you relate this unusual incident?

A. Four gentlemen from the union came into my office and handed me a letter stating that the men noted in that letter were not in good standing with the union, and that, therefore, I must dismiss them.

Q. Before we go into that, let me date the events chronologically, Mr. Altman.

Were you at the plant on Saturday, July 28, 1945? A. Yes, sir.

Q. There has been some testimony here about a notice that was posted at the plant at that time. Do you have any recollection of such a notice?

A. Yes, sir.

Q. Can you state in substance what was stated in the notice? A. In that notice?

Q. Yes, please.

A. Well, the notice said that a meeting of the Welfare Association, of the Employees of the Col-

(Testimony of Clifford A. Altman.)

gate-Palmolive-Peet Company was going to be held. I have forgotten the time and place, but I guess that is a matter of record.

Q. Yes, that is sufficiently in the record. That is quite all right, Mr. Altman.

Did you do anything, were you caused to do anything by the reading of that notice?

A. No, sir.

Q. Did you inform any of your fellow executives?

A. I told Mr. Wood about it, yes, sir.

Q. How did you come to tell Mr. Wood about it? [568]

A. He called me on the phone and asked me if anything unusual had happened, and I related this incident.

Q. Did Mr. Wood have any commentary to make?

A. Nothing in particular that I remember.

Q. All right, sir. Let's go back then to July 30. And you were saying that four gentlemen came to your office, and what did they do?

A. They handed me the letter, the contents of which I have already stated.

Do you wish me to repeat it?

Q. Yes, if you will, please.

A. As I remember it, the letter stated that "The following men were no longer in good standing with the union," therefore we must dismiss them immediately from our employ.

Q. Who handed you the letter?

(Testimony of Clifford A. Altman.)

A. I believe it was Paul Heide.

Q. Is it your testimony that they are officers of the CIO union?

A. That was my understanding, yes, sir.

Q. Yes. What did you do when you were handed that notice? By the way, before we get into that, who were named in that notice?

A. Frank Marshall, Harry Smith, Dave Luch-singer, Sanford Moreau, and Clyde Haynes.

Q. I hand you Board's Exhibit 3 and ask you to look at it. [569] A. Ask what?

Q. Ask you to look at it. It purports to be a copy, I think, of the notice you received.

A. (Examining document.)

Trial Examiner Ruckel: That was the notice?

The Witness: The notice, yes, sir.

Q. (By Mr. Hecht): That is the copy of the notice you received? A. Yes, sir.

Q. What did you do after you had been handed that notice?

A. Well, of course, I was much upset by it, and I immediately went over to Mr. Railey's office to confer with him.

Q. And what was the outcome of your conference with Mr. Railey?

A. We came back to my office to communicate with these gentlemen.

Q. And what happened?

A. Well, as you understand, Mr. Railey was the spokesman, and he voiced our sentiment that we

(Testimony of Clifford A. Altman.)

had no reason, so far as we knew, for dismissing these men, and they immediately called attention to the fact that according to our contract if they were not in good standing they could not work there, and our reasoning with them was a protest that we had no reason to dismiss these men.

Q. And what happened after that? [570]

A. Well, the spokesman on the other side said, "Well, if you don't want to dismiss them bring them in here and we will dismiss them."

Q. And did you bring the men in?

A. I did, or I asked them to come in, and they came.

Q. And what else occurred?

A. I think it was Mr. Heide handed each one of them a typewritten piece of paper. These gentlemen read it over, and without comment they crumpled the papers in their hands, stuffed them in their pockets, and walked out.

Q. And did the union representatives remain in your office? A. For a little while, yes.

Q. Was there any further conversation with them?

A. Well, there was some further conversation, not at great lengths, but I do not remember the content of it now.

Q. Did you have an opportunity of seeing what was on the pieces of paper that were handed to the five men? A. No, I never saw them.

Q. Have you ever seen it? A. No, sir.

(Testimony of Clifford A. Altman.)

Q. Did the union officials make any further requests of you?

A. I do not remember of anything further right at that time. [571]

Q. That was the end of the matter, they walked out, and you went back to your duties?

A. That is right.

Q. Were you at the plant on July 31, 1945?

A. Yes, sir.

Q. Anything unusual occur on that date?

A. Yes, sir.

Q. Will you please relate to the Examiner what occurred?

A. Well, there were four men that called on me and——

Q. (Interposing): Before you go any further, will you name the persons, if you know their names?

A. Mr. Sherman, Mr. Lonnberg, Olsen and Thompson.

Q. Were they employees at the plant?

A. Yes, sir.

Q. All right. Will you relate what occurred between you and these gentlemen?

A. They asked me to allow the men who had been sent out of the plant the day before to return to work.

Q. And what did you do upon having that request made of you?

A. My reply was that these men could not be put to work by us until they had answered the

(Testimony of Clifford A. Altman.)

charges made by the union, and they had been restored to good standing.

Q. And was that the end of the matter?

A. They left my office at that time, yes. [572]

Q. Did you communicate this event to either Mr. Railey or Mr. Wood?

A. I can't remember the exact chronological order, but shortly thereafter these men went to Mr. Railey's office and talked to him, and in the meantime the officers of the union came into my office, and I believe it was at that time they handed me a letter saying that the men I have just mentioned were also no longer in good standing with the company and they must be dismissed.

Mr. Hecht: Pardon, Mr. Royster. Did that go into evidence?

Mr. Royster: I am not sure that it did.

(Mr. Royster handed Mr. Hecht a document.)

Q. (By Mr. Hecht): I hand you a photostatic copy of a letter written on the stationery of the Warehousemen's Union dated July 31, 1945, and addressed to the Colgate-Palmolive-Peet Company, attention of Mr. C. A. Altman, signed by Paul Heide, Vice President.

Will you look at it?

A. That is the document.

Q. That is a true copy of the document that was handed you?

A. As I remember it, yes, sir.

(Testimony of Clifford A. Altman.)

Mr. Hecht: Yes. May it be marked as Respondent's next exhibit in order? [573]

(Thereupon the document above referred to was marked Respondent's Exhibit No. 16 for identification.)

Mr. Edises: May I see it?

Mr. Hecht: Yes (handing document).

Mr. Rowell: Let me see it.

(The document was handed to Mr. Rowell.)

Trial Examiner Ruckel: Are you offering it?

Mr. Hecht: We offer it in evidence, Mr. Examiner.

Trial Examiner Ruckel: Any objection to it?

Mr. Royster: No objection.

Trial Examiner Ruckel: It will be received.

(The document heretofore marked Respondent's Exhibit No. 16 for identification was received in evidence.)

Q. (By Mr. Hecht): Mr. Altman, when the four men first walked into your office, and prior to the time that you were handed that letter from the ILWU, did Mr. Thompson or Mr. Sherman or Mr. Lonnberg or Mr. Olsen or someone speaking for them, tell you if they were going to back up their demand in some manner?

A. I don't recall just what they did say.

Q. You don't recall? A. No.

Q. I see.

A. Except I said that they requested us to put the other men back, didn't I, in my former statement? [574]

(Testimony of Clifford A. Altman.)

Q. Yes. A. Yes.

Q. Well, when the union then came in, what did you do? A. I sought help.

Q. And handed you that letter?

A. I sought help. I went to Mr. Railey.

Q. And did you get help?

A. Well, I went over to Mr. Railey's office and showed him the communication, and when I got to Mr. Railey's office the four men mentioned in the message were there.

Q. You mean Messrs. Thompson, Sherman, Lonnberg and Olsen? A. That is right.

Q. Yes. And what happened?

A. Well, while we were conversing there one of the gentlemen from my office called on the phone and said they wanted action immediately on this request.

Q. Who wanted action immediately on what request, Mr. Altman? Will you elaborate?

A. The officers of the union who had handed me this request to dismiss these gentlemen, Sherman, Lonnberg, Olsen and Thompson, and they did not wait for a reply. They came right over and we invited them into the office.

Q. Whose office?

A. Mr. Railey's office, where the other men were.

Q. Yes. What followed after their entry into that office? [575]

A. Well, I don't recall the exact way that they all got together, but in a few minutes the five men

(Testimony of Clifford A. Altman.)

who had gone out the day before— do you want their names?

Q. Yes, will you name them?

A. Marshall, Smith, Luchsinger, Moreau, and Haynes, and the four——

Q. (Interposing): Will you now name the union officers who arrived at the second demand for dismissal?

A. Mr. Lynden, Mr. Duarte——

Mr. Edises (Interposing): Lynden?

The Witness: Lynden, that is right. Mr. Gonick, and I believe Mr. Gleichman was there, and Mr. Lynch.

Q. (By Mr. Hecht): And did any conversation ensue between the persons assembled there?

A. Yes, sir, there was some conversation there. The spokesman for the union said that the men——

Q. (Interposing): Who was he, if you remember?

A. Mr. Lynden. Lynden said these men cited would have to stand trial, and if they were cleared of the charges that had been made against them, why, they would be allowed to return to work, and also the union said they would pay them for the time they lost if they proved that they were innocent.

Q. Did you inquire as to the nature of the charges made against these men? [576]

A. Well, we did at various times ask what the charges were, and the reply was that they were not in good standing and they would have to stand trial.

(Testimony of Clifford A. Altman.)

Q. That is as much information as you got?

A. That is right.

Q. Did any further colloquy take place?

A. Well, the gist of the conference was that we would like to have the employees returned to work, and if they had their differences that they should work them out some other place than our place of business.

Q. Yes.

A. And the officers of the union cited above suggested that these men who had been designated as not being in good standing be requested to leave the plant.

Q. Were they so requested? Did you request them to leave the plant?

A. I do not recall that I requested them in so many words. The upshot was that they went out in the plant——

Trial Examiner Ruckel (Interposing): Who is “they”?

The Witness: These nine men from the working side of the union.

Q. (By Mr. Hecht): Perhaps it will aid you, Mr. Altman, and it might aid the Examiner, to call them the five Stewards and the five committeemen. I think that is a good description. [577]

A. Yes. They went out in the plant and remained around for a short time, and then the five Stewards and the four committeemen, as I recall it, left, and also the Business Agents left.

Q. You mean the officers of the union?

(Testimony of Clifford A. Altman.)

A. The officers, yes.

Q. That ended that particular incident?

A. Yes, sir.

Q. Anything else occur during that day?

A. Well, there were rumors flying around, and the upshot of it was that when the employees went out of our plant at noon for the lunch period they did not return to work at 12:30, that is, the great majority. There were a few who remained on the job all day, but the great majority went out.

Q. When did this "great majority" return to work?

A. Well, the great majority returned to work on the morning of August 3.

Q. Did you plant operate during that period?

A. In a limping way, yes, sir.

Q. And at that time did you know that the ILWU had a pledge not to strike during wartime?

A. Yes, sir.

Mr. Rowell: That is immaterial, whether he knew it or not. [578]

Mr. Hecht: It is very material.

Trial Examiner Ruckel: He may answer.

Q. (By Mr. Hecht): Your answer was "Yes"?

A. Yes, sir.

Q. And there was a stoppage of approximately two or three days at your plant? A. Yes, sir.

Q. Did you at any time between July 30 and the 3rd of August learn from any source, or did you get any information from any source as to what

(Testimony of Clifford A. Altman.)

was alleged to be the reason for this controversy and this work stoppage?

A. Well, nothing definite, no official notice, if that is what you mean.

Q. Well, in the press or elsewhere?

A. Well, I read the articles in several of the daily press, yes.

Q. And what did you learn from the press?

A. Well, there was an accusation of racial discrimination seemed to be the main topic.

Q. Was there any mention in the press as to this IWLW strike pledge?

A. I don't recall that in connection with this article.

Q. Do you know against whom this accusation of discrimination was leveled in the papers?

Mr. Rowell: Well, now, that is going to be excepted to. [579]

Mr. Hecht: I am asking for the truth or falsity of the statement.

Trial Examiner Ruckel: I understand. He may answer.

A. Well, the statement was somewhat non-clear, I thought, as to who was the discriminating party.

Q. (By Mr. Hecht): But you knew that there were charges of that discrimination?

A. Yes, sir.

Q. Did you, during this period, following the period of August 3, did you get any communication of any type from either the committeemen or the discharged stewards?

A. Get any what?

(Testimony of Clifford A. Altman.)

Q. Any communication, were you called on the phone by anyone? A. Not that I recall.

Q. Didn't Mr. Sherman call you on the phone, making some inquiry about his coming to work?

A. That is right.

Q. Will you relate that?

A. Mr. Sherman called me one evening— I don't remember the date, but he asked me if I wanted him to return to work. And I called his attention to the fact that the union had said he was not in good standing, and until he cleared those charges, why, he was not eligible for employment.

Q. Yes. What did Mr. Sherman say to that?

A. He said, "O.K."

Q. That ended that conversation?

A. That ended it.

Q. Mr. Altman, it has been testified here that on August 25— is it August 25? No. Pardon me. I withdraw that question.

Did anything concerning the nine men, to-wit, the five Stewards and the four committeemen, occur on or about August 17?

A. I don't recall the date. It may be that is the date they came to the plant and presented themselves for work.

Is that the date?

Q. That is the incident to which I have reference.

Will you relate to the Examiner just what occurred in connection with that?

A. They came to our plant and presented them-

(Testimony of Clifford A. Altman.)

selves for work, and Mr. Wood, the man who has charge of our labor relations, talked to them.

Q. What was that conversation or that talk?

A. Well, the gist of it was that until they were cleared through the union, why, we couldn't put them to work.

Q. Did any one of the nine men or their spokesman state to Mr. Wood or to you the reason for their being in bad standing with the ILWU?

A. Did they state their reason? [581]

Q. Yes.

A. Or ask their reason?

Q. No. Did they state any reason for being in bad standing with the ILWU?

A. Not so far as I heard.

Q. I see. Did they deny that they were in bad standing with the ILWU?

Mr. Rowell: That is objected to. There is no testimony that they were accused of——

Trial Examiner Ruckel: He may answer.

A. Well, at that time I don't remember that they made any statement one way or the other about that.

Q. (By Mr. Hecht): They made no statement. Going forward to August 31, Mr. Altman, it has been related here that prior to seven o'clock A. M. of that day there was some sort of a glomeration of men, described variously as a picket line, in front of the plant.

Do you recall that incident?

A. Do you mean August or July?

(Testimony of Clifford A. Altman.)

Q. I think it is August, Mr. Altman.

A. Well, maybe if you refresh my memory—I was thinking of the July 31—the stopping of the men to check their books, I understood, although I was not——

Q. (Interposing): I think you are 30 days off on that, Mr. Altman. Maybe this will refresh your recollection. It, I [582] think, was one or two days prior to the removal from employment of about 17 or 18 of your employees.

A. Well, if that is the case, I remember of them stopping them at the gate, yes, and checking.

Q. Who was doing the stopping, if you know?

A. The officers of the union.

Q. Can you name some of those officers?

A. Well, I believe Mr. Gleichman was there, I believe Mr. Gonick was there.

Q. This stopping, as you describe it, for the purpose of checking books, where did it occur? Inside or outside your plant?

A. At first it was just outside the gate.

Q. I mean, did this thing— was this thing finally brought into your gate?

A. Some of it, yes, sir.

Q. How did that come to pass?

A. Well, I believe there was a protest by the Police Department that they were blocking the street, so then they came inside.

Q. Yes. Let me ask you this: Has it been the usual custom at the Respondent's plant to permit

(Testimony of Clifford A. Altman.)

representatives of the ILWU to come in to check such things as dues books, etc? A. Yes, sir.

Q. That is a custom of many years standing?

A. Yes, sir.

Trial Examiner Ruckel: And to collect dues?

The Witness: Yes, sir.

Q. (By Mr. Hecht): Do you know a young lady by the name of Ophelia Reyes, Miss Ophelia Reyes? A. Well, I know the name.

Q. You know the name? A. Yes, sir.

Q. Do you recall someone by that name being employed at the plant? A. Yes, sir.

Q. On the day in question of this picket line, or whatever you want to call it, did you have occasion to walk outside the plant, the fence surrounding the plant, and walk down the block?

A. I believe I did walk down a short way there, yes, sir.

Q. Do you recall approaching a group in which Miss Reyes, it has been testified, was in, and being asked why they were not permitted to come into the plant?

A. I do not remember that incident.

Q. Do you recall at this moment some officer of the union, Business Agent (maybe Mr. Gleichman) stated in your presence that they were not permitted to enter because they were AF of L adherents or participants?

A. I never heard any such statement at all. [584]

Q. Did you stop to talk to anybody in the course of your walk outside the plant?

(Testimony of Clifford A. Altman.)

A. I do not remember of conversing with anybody there.

Mr. Rowell: I move to strike the answer that he didn't make any such statement, Mr. Examiner.

Trial Examiner Ruckel: I beg your pardon?

Mr. Rowell: His memory is apparently a blank on that occasion. I move to strike the answer, that he never heard any such statement. He can't even remember the occasion.

Trial Examiner Ruckel: He gave two answers, and in one he said he recalled making such statement.

Is there some inconsistency, you mean?

Mr. Rowell: No. He says he did not hear a statement made by Mr. Gleichman that these men were not being allowed in because they were A F of L. He remembers that definitely because——

The Witness: I did not hear it. I did not say it was not made.

Trial Examiner Ruckel: What is your point?

Mr. Rowell: He has testified he has no memory as to the occasion. All he can testify is that he doesn't recall whether a statement was made or not.

Mr. Edises: Mr. Examiner, I submit the record speaks for itself.

Trial Examiner Ruckel: I don't follow that. [585]

Mr. Edises: I beg your pardon. The record speaks for itself.

Trial Examiner Ruckel: Go ahead.

Q. (By Mr. Hecht): You didn't hear any such statement, is that your testimony, Mr. Altman?

(Testimony of Clifford A. Altman.)

A. That is my testimony, yes, sir.

Q. Moving forward to August, or rather, September 1, 1945, Mr. Altman, did anything extraordinary occur at the plant on that day?

A. What date?

Q. September 1, 1945.

What is the date of that, when all those 18—

Mr. Royster (Interposing): That was the first, September 1.

Q. (By Mr. Hecht): September 1, yes?

A. Yes, sir, we received another communication.

Q. From the union? A. Yes.

Q. Did you receive it? A. Well, I saw it.

Q. I will show you Board's Exhibit No. 10, the photostatic copy of a letter on ILWU stationery, and ask you to look at it.

A. (Examining document): I saw it, yes, sir.

Q. Will you testify as to whether that is a true copy of [586] the letter received by you?

A. It is.

Q. It is directed to your attention, is it not?

A. Yes, sir.

Q. What did you do with that letter? Did you refer it to Mr. Wood?

A. Well, Mr. Wood and Mr. Railey.

Q. And what happened?

A. Well, later on in the day—as I recall it, this came in in the morning. Later on in the day we called these men cited in the letter into Mr. Riley's office and had some conversation with them.

Q. Did you speak? A. No, sir.

(Testimony of Clifford A. Altman.)

Q. Did Mr. Wood speak?

A. Oh, maybe an occasional word or so, but the main spokesman was Mr. Railey.

Q. And what did Mr. Railey say?

A. Well, his statement was in the form of expressing his—I can't find the word—regret at having to comply with this request. It was not only affecting the people cited in the missive, but it was affecting the company. And, as I recall it, his remarks were in the form of commiserations in connection with the situation.

Q. What other company representatives were present at that [587] time?

A. From the management end?

Q. Yes, sir.

A. Mr. Wood, Mr. Railey, Mr. Stanberry, Mr. Carter, and myself.

Q. Did Mr. Carter or Mr. Stanberry say anything? A. I do not recall that they did.

Q. I will ask you the specific question, whether you heard Mr. Railey at that time and place say “We didn't want you in the first place to join a union, and we fought you. Now you must take the consequences”?

A. I did not hear him make that statement, and it is very unlike the gentleman.

Mr. Rowell: I ask the last part of the answer be stricken.

Trial Examiner Ruckel: It may be stricken.

Q. (By Mr. Hecht): Did you hear any state-

(Testimony of Clifford A. Altman.)

ment that might be in substance similar to that made by Mr. Railey? A. No, sir.

Q. Did you hear either Mr. Wood or Mr. Railey say to anyone present at the time, "If you had not worn the A F of L buttons you wouldn't be in the mess you are in"? A. No, sir.

Q. You are positive of that?

A. Yes, sir. [588]

Mr. Hecht: I guess that is all.

Q. (By Mr. Edises): Mr. Altman, during the entire period of the war, with the exception of this work stoppage of July 31 to August 3, was there any strike or other interruption of production at your plant by the ILWU, or members of the ILWU? A. No, sir.

Mr. Edises: That is all.

Cross Examination

By Mr. Royster:

Q. How long have you been at the Berkeley plant, Mr. Altman?

A. At the Berkeley plant?

Q. Yes, sir.

A. Since September 9, 1920.

Q. Now, you testified that on Saturday, July 28, you saw a notice on the bulletin board which said something about a meeting of Employees Welfare Association? A. I did.

Q. What bulletin board did you see that on?

A. On the bulletin board in "A" Building.

Q. And is that near your office?

(Testimony of Clifford A. Altman.)

A. About 90 feet from my office.

Q. Near a time clock, I believe?

A. Yes, sir.

Q. Did you ever see any other bulletins on that board? [589] A. Have I?

Q. Yes. A. Yes, sir.

Q. You pass by the board frequently?

A. Yes, sir.

Q. Several times a day? A. Yes, sir.

Q. You generally stop to see if there is anything new on the board?

A. If I see anything new I generally read it, yes.

Q. Does the company put up bulletins on that board? A. Yes, sir.

Q. Advices to employees, announcements, that sort of thing? A. Yes, sir.

Q. What limitation is there on the use of that bulletin board, if any? Can anyone come in there and post what they like on it?

A. As far as the company is concerned, yes, sir. Well, maybe I should qualify that. Any employee can put anything up there.

Did you mean that people could come in from the outside and put it up?

Q. Well, that was the way my question was framed. Any employee, you say? [590]

A. Yes, sir.

Q. Do you possess any kind of control over what material goes on that board? A. No, sir.

Q. If an employee wanted to put up an ad there

(Testimony of Clifford A. Altman.)

for Ivory soap, would you think that was all right?

Trial Examiner Ruckel: After all, that is going pretty far.

Mr. Royster: Well, I want it to go pretty far.

A. Well, I don't know. I have never seen anything like that happen, so I can't tell you.

Q. (By Mr. Royster): Well, isn't it true, Mr. Altman, that you expect employees or anyone else who puts up a notice there to put up a notice that is not offensive? If you saw a notice that you thought would be offensive to your employees, wouldn't you tear it down?

Mr. Hecht: I am going to object to the form of the question.

Trial Examiner Ruckel: Well, if he saw a notice that was offensive, you say?

Mr. Royster: Yes.

Trial Examiner Ruckel: Would he tear it down?

Mr. Royster: Yes.

Mr. Hecht: I don't know what relevancy this has.

Mr. Royster: It is just relevant to this extent: I am [591] trying to discover whether or not the company maintained any kind of control over the notices that were posted on the board.

Trial Examiner Ruckel: Objection sustained. Find out if the company ever did tear anything down.

Q. (By Mr. Royster): Have you ever removed any notice from that bulletin board?

(Testimony of Clifford A. Altman.)

A. We have removed our own notices after they were past due.

Q. Have you removed any notices because you thought they should not be on that board?

A. No, sir.

Q. Have you knowledge that any notices have been removed for that reason?

A. No direct knowledge, no, sir.

Q. What indirect knowledge have you?

Mr. Edises: Well, now, I will object to that as obviously calling for matters not within his own knowledge; hearsay.

Mr. Royster: Well, not necessarily.

A. I never saw anybody remove a notice from the bulletin board.

Q. (By Mr. Royster): Well, now, did anybody ever tell you that he had removed a notice from the bulletin board? A. No, sir. [592]

Mr. Hecht: Now, Mr. Examiner—

Mr. Edises (Interposing): He answered “No, sir.”

Trial Examiner Ruckel: If there is an objection, objection overruled.

You may answer.

Mr. Royster: I understand he did answer.

Q. (By Mr. Royster): You have answered, Mr. Altman? A. Yes, sir.

Q. Your answer was “No, sir.”

A. My answer was “No, sir.”

Q. Now, you testified also, Mr. Altman, that on

(Testimony of Clifford A. Altman.)

July 30 the stewards were called to your office and there was a conversation, or at least you were——

A. (Interposing): Not my office.

Q. Mr. Railey's office, was it?

A. That is right.

Q. That there was a conversation then with the ILWU representatives? After the Stewards had been given their letter, they took their letters, as you said, I believe, ——

A. (Interposing): Well, that happened the day before.

Q. July 30?

A. Oh, I thought you said 31st.

Q. I didn't intend to. I meant July 30.

A. Well, I may be mistaken. On the 30th, you are right.

Trial Examiner Ruckel: Off the record.

(Remarks outside the record.) [593]

Trial Examiner Ruckel: On the record.

We will recess until 1:30.

(Whereupon, at 12:00 M. a recess was taken until 1:30 P.M. of the same day.) [594]

(After recess:)

(Whereupon, the hearing was resumed, pursuant to recess, at 1:30 P.M.)

Trial Examiner Ruckel: The hearing will resume, please.

Mr. Altman.

CLIFFORD A. ALTMAN

called as a witness by and on behalf of Respondent, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination
(Resumed)

Mr. Royster: Can you tell me at what point——

Mr. Hecht (Interposing): May I just enter an objection at this point, Mr. Examiner? If I recall the testimony correctly, Mr. Royster was examining Mr. Altman on the use of the bulletin boards.

Trial Examiner Ruckel: Yes, sir.

Mr. Hecht: And, as I recall, my motion to dismiss the charge respecting the use of the bulletin boards was granted, there was no refusal of use of the bulletin boards, and I don't think that matter should be gone into on cross examination.

Trial Examiner Ruckel: I think the purpose of going into it was to see if he had notice of what this union scrap was about by reason of having seen——

Mr. Hecht: You mean as to the exhibits of the Board [595] that are in now?

Trial Examiner Ruckel: Yes.

Mr. Hecht: For that limited purpose, that is all right.

Trial Examiner Ruckel: Is that the purpose?

Mr. Royster; Just generally to show he was aware of what appeared on the bulletin board, and that the bulletin board was the company's bulletin board.

(Testimony of Clifford A. Altman.)

Q. (By Mr. Royster): Now, on July 30, Mr. Altman, the company was requested to discharge the five Stewards, or to suspend them from employment. After that had been done you testified that you had further conversations with the ILWU representatives.

Now, may I have the exhibit file?

(The exhibit file was handed to Mr. Royster.)

Q. (By Mr. Royster): Were you aware at that time, during the time that you were conversing with the ILWU representatives, and after the Stewards had been notified of their suspension, that Harry Smith, for example, had then been employed by your company for nearly 15 years?

Mr. Edises: Objected to, incompetent, irrelevant, and immaterial.

Mr. Hecht: I object to that.

Trial Examiner Ruckel: What is the relevancy?

Mr. Royster: I propose to show by this line of questioning [596] that every one of these Stewards was a man who had been in the employ of the company for a great length of time, and suggest to this witness the reasonableness of my conclusion that he explored rather extensively with the ILWU representatives the reasons underlying the requests for suspension.

Mr. Edises: Well, Mr. Examiner, I point out that their length of service with the company is not disputed, it is in the record, and the knowledge of that fact in the mind of this witness is of no ma-

(Testimony of Clifford A. Altman.)

teriality to that issue. He is certainly entitled to ask the direct question as to what was said, but what this witness may have had lurking in the back of his mind has no direct bearing on the issue.

Mr. Royster: This is cross examination, Mr. Edises. And may I inquire: Did you say that the length of time these individuals had been employed was in the record?

Mr. Edises: Isn't it?

Mr. Royster: Oh, yes, it is.

Mr. Hecht: Yes, he put an exhibit in.

Mr. Royster: My impression was you said it was not in the record.

Mr. Edises: No, I say it is in the record.

Trial Examiner Ruckel: Objection sustained.

Q. (By Mr. Royster): Well, what inquiry, if any, did you make then of the ILWU representatives as to the reasons for [597] the requested suspensions?

A. I was not the spokesman.

Q. No. I am asking you what you did, though, Mr. Altman? A. What I did?

Q. Yes. What you asked——

Trial Examiner Ruckel (Interposing): If anything.

The Witness: I beg your pardon?

Trial Examiner Ruckel: If anything. Do you understand the question, Mr. Altman?

The Witness: Why, I am trying to think what I can remember, what was said further than what has been stated.

(Testimony of Clifford A. Altman.)

Mr. Hecht: Well, repeat what you said.

The Witness: I don't know that I can elaborate any more on it.

Q. (By Mr. Royster): Well, did you make any inquiry (you, yourself, now) of any of these ILWU representatives as to the reason for suspending these five stewards?

A. Not that I remember.

Q. Did Mr. Railey make any inquiry in your hearing?

A. We made the statement that we——

Q. (Interposing): Now, just a moment, Mr. Altman.

Mr. Hecht: Let him finish his answer, please.

Mr. Royster: It starts out not being answered. He said, "We made the statement."

The Witness: Speaking for the company. [598]

Q. (By Mr. Royster): I asked him what Mr. Railey asked in his presence of the ILWU representatives concerning the reasons underlying the requested suspensions?

A. I do not recall.

Q. Do you recall if Mr. Railey made any inquiry? A. Well, we——

Q. (Interposing): Just a minute now!

Mr. Hecht: Let him answer.

Mr. Royster: I submit that he is not answering. He is saying "We." I am asking——

Mr. Hecht (Interposing): Well, I move to strike everything——

(Testimony of Clifford A. Altman.)

Trial Examiner Ruckel: He may answer.

Continue with your answer. Did Mr. Railey make any inquiry in your presence as to why the suspension of these men was requested?

The Witness: Well, he certainly made the statement that as far as we knew there was no reason for their being suspended.

Trial Examiner Ruckel: Well, that is a statement. Now, did he make any inquiry as to why they were being requested to be suspended?

The Witness: Well, the statement—or the question was asked, and they replied that they were not in good standing with the union. [599]

Trial Examiner Ruckel: Mr. Railey asked that?

The Witness: Yes.

Trial Examiner Ruckel: You have already testified to that. Did he make any further inquiry?

The Witness: Well, what further inquiry could he make?

Trial Examiner Ruckel: Well, if he didn't make any, just say that he didn't. Maybe he couldn't. We want to know if he did.

The Witness: That is as far as we know.

Q. (By Mr. Royster): In other words, Mr. Railey made no inquiry——

Trial Examiner Ruckel: Aside from——

Mr. Royster (Interposing): He has not testified he made an inquiry.

Mr. Hecht: He has indeed. He said Mr. Railey asked, and the union men said they were in bad standing.

(Testimony of Clifford A. Altman.)

Mr. Royster: I will submit to what the record shows.

Mr. Hecht: The record shows that this witness said——

Mr. Royster (Interposing): Will you read back the record, Miss Reporter, please?

Trial Examiner Ruckel: Read back the record.

(The testimony and statements referred to were read by the reporter.)

Mr. Royster: I will let it drop at that point.

Q. (By Mr. Royster): Now, Mr. Altman, do your duties require [600] that you go out in the operating departments of the plant frequently?

A. I make it my duty to do so, yes, sir.

Q. That is a daily occurrence, is it?

A. Yes, sir.

A. And during the period from about July 21 to July 30, 1945, was it your practice to go out through the plant? A. Yes, sir.

Q. Daily? A. Yes, sir.

Q. During these daily tours of the plant did you become aware that there was, well, a certain amount of unrest among your employees?

A. I did not.

Q. Now, on July 28 you saw on the bulletin board a notice of a meeting to be held by the Employees Welfare Association. What did that mean to you? A. Not a thing!

Q. Nonetheless you saw fit to call it to the attention of Mr. Wood, did you not?

(Testimony of Clifford A. Altman.)

A. Why, I told him about it, yes.

Q. Yes. It was a matter worthy of comment, wasn't it? A. Possibly.

Q. Did you, when you were requested—and when I say “You” at this time I am thinking of the company—when [601] the company was requested to discharge or suspend the five Stewards did you associate that request in any respect with the notice that you saw on the bulletin board July 28?

A. I don't think I did.

Q. Did you know that a meeting of your employees was held at the Finnish Hall on the afternoon of July 30, 1945?

A. Only by hearsay. I didn't attend it.

Q. You learned of it, you knew of it, did you not? A. Yes, sir.

Q. It was a matter generally known throughout the plant, was it not? A. Yes, sir.

Q. And you knew, did you not, that this meeting concerned the union affiliation of your employees?

A. I don't know how I would know that.

Q. Well, I am asking you if you did know it?

A. I did not.

Q. Did you have any opinion as to the purpose of this meeting?

A. There were lots of stories going around, but I had no direct evidence.

Q. Well, did you have any opinion about it?

Mr. Hecht: I think his opinion is not material,
Mr. Examiner.

Mr. Royster: The state of this man's mind on

(Testimony of Clifford A. Altman.)

the dates [602] in which we are interested is just as much a matter of fact as the state of his stomach and is just as susceptible of proof.

Mr. Hecht: If you will be consistent with that statement when I examine the other witnesses I will accept it.

Trial Examiner Ruckel: I think it is relevant. You may answer as to what your opinion was.

A. Well, I couldn't help but hear stories, but I had no direct evidence because I was not invited to the meeting, and I did not attend.

Q. (By Mr. Royster): I understand that. Now, I ask you again: what was your opinion, if you had one, with respect to the purpose of this meeting?

Mr. Hecht: When? Before or after the meeting, Mr. Royster?

Mr. Royster: He can tell me when he formed the opinion.

A. That is a pretty hard question to answer, just when I formed an opinion. The events and the news and the gossip and all gathered and accumulated until we finally found out some things, but just when it occurred I couldn't tell you.

Q. (By Mr. Royster): Well, I suppose then, Mr. Altman, you will agree that eventually you discovered that the purpose of this meeting was to disassociate from the ILWU and to choose another bargaining representative?

A. That eventually came out, yes. [603]

(Testimony of Clifford A. Altman.)

Q. Now, will you tell me as best you can when you first learned that?

A. It would have to be a guess. I can't say.

Q. All right. Let's have your best guess.

Mr. Edises: Well, Mr. Examiner, I submit that by the witness' own testimony it is clear that a guess would be utterly valueless for the purposes of the proof. I object to the question on that ground.

Mr. Royster: All right. I will try to put it a little more closely.

Q. (By Mr. Royster): Did you know of the purpose of this meeting on the day following its holding, on July 31?

A. Only by hearsay. The employees did not ask me——

Q. (Interposing): All right. Very well. You have answered.

I am not sure that I correctly recall your testimony on this point, and if I am wrong, you may, of course, correct me.

On August 17, 1945, the testimony is, and I believe you agreed, that the five stewards and the four committeemen applied for reinstatement to their positions.

Was it to you that they applied for reinstatement?

A. Well, Mr. Wood and I together were in the office, in my office, and they came in there, and Mr. Wood was the spokesman.

Q. Now, when they applied to you for reinstatement did you know on that date, August 17, 1945,

(Testimony of Clifford A. Altman.)

that the meeting of July 30 [604] had been held for the purpose of severance from the ILWU and forming another labor organization?

A. I presume it was fairly definitely stated by that time.

Mr. Royster: I believe that is all.

Trial Examiner Ruckel: Any questions by the A F of L?

Mr. Rowell: Just one moment, please. I don't believe I have any questions.

Trial Examiner Ruckel: Any further questions by the Respondent?

Mr. Hecht: Mr. Edises, have you any examination?

Mr. Edises: Just one moment.

Redirect Examination

By Mr. Edises:

Q. Mr. Altman, did you ever arrive at a fixed and definite belief as to what the motive of the ILWU was in requesting these discharges?

A. You mean why they wrote those letters?

Q. That is right. Now, I would like to make my question perfectly clear. I am not asking you as to what may have occurred to you speculatively as possible reasons. The question is whether you ever arrived at any fixed and definite belief as to what the motive of the ILWU was in requesting these discharges?

A. Well, I had never followed it through on that score.

(Testimony of Clifford A. Altman.)

Trial Examiner Ruckel: What is your answer, though?

Mr. Hecht: Will you read the answer, Miss Reporter? [605]

(The answer referred to was read by the reporter.)

Trial Examiner Ruckel: Well, it seems to avoid an answer rather than being an answer.

The question is: Did you ever arrive at a fixed opinion as to what the motive was?

The Witness: Well, if the ILWU did not tell us the reason, anything that I could state would simply be an assumption.

Trial Examiner Ruckel: Well, then, your answer is it did not?

The Witness: That is right.

Mr. Edises: That is all.

Mr. Hecht: May I ask some questions, Mr. Examiner?

Trial Examiner Ruckel: Yes, sir.

Q. (By Mr. Hecht): Mr. Altman, you were asked whether on *October* 17 you already knew about the A F of L movement in the plant, or words to that effect? That is correct, isn't it?

A. Yes.

Q. What else did you know about on August 17 besides this A F of L movement?

A. What else did I know about?

Q. What else did you know besides this A F of L movement?

(Testimony of Clifford A. Altman.)

Mr. Rowell: That calls for an encyclopedic answer, Mr. Examiner. [606]

Q. (By Mr. Hecht): In connection with this matter you know that there had been a work stoppage? A. Yes, sir.

Q. You knew there had been some talk in the paper about racial discrimination?

A. Yes, sir.

Mr. Royster: This is a rehashing of cross examination.

Mr. Hecht: No, it is in response to your questioning.

The Witness: I knew those things. Those were public utterances.

Q. (By Mr. Hecht): As public as the A F of L movement in the plant?

A. Well, the A F of L, as far as I know, never sent me a notice that they were trying to organize our employees.

Does that answer the question?

Q. Yes.

A. It was never put down in writing.

Q. To you personally, that is?

A. To me personally.

Mr. Hecht: I have no further questions.

Mr. Royster: Nothing further for the Board.

Mr. Rowell: May I ask a question?

Trial Examiner Ruckel: Yes.

(Testimony of Clifford A. Altman.)

Recross Examination

By Mr. Rowell:

Q. In regard to the question concerning the motive of the ILWU in requesting the discharges, did you [607] ever form an opinion, although it might not have been as strong as Mr. Edises requested, did you ever form an opinion as to their motive in requesting the discharges?

A. I couldn't form that opinion.

Q. My question is, did you or did you not?

A. I did not.

Q. Did you have some information as to that motive, whether by hearsay or otherwise?

A. Well, there were numerous things that you might have—if you wanted to carry through and say that they were the things that caused it, but I had no evidence as to what that—what lay behind these orders.

Mr. Rowell: I have no further questions.

Trial Examiner Ruckel: That is all.

(Witness excused.)

Mr. Hecht: Call Mr. Carter.

CECIL R. CARTER

called as a witness by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

(Testimony of Cecil R. Carter.)

Direct Examination

By Mr. Hecht:

Q. Will you state your name for the record, Mr. Carter? A. Cecil R. Carter.

Q. What is your business or occupation?

A. Process Supervisor, Colgate-Palmolive-Peet Company, Berkeley.

Q. And were you employed by the—let me put it another way.

How long have you been employed by the Respondent?

A. Since September 1924.

Q. Were you at the plant on or about August—when was that visit of Mr. Howard's?

Mr. Royster: August 25.

Q. (By Mr. Hecht): August 25, 1945, at the plant? A. I was.

Q. What day of the week was that?

A. Saturday.

Q. Where in the plant were you at the time? Oh, yes, I imagine you were all over the plant?

A. All over the plant.

Q. Calling your attention to about 1 or 1:30 in the afternoon, being in "A" Building, can you tell me of anything unusual that occurred at that time?

A. Yes. I was informed by Miss Kaiser, our Plant Nurse, that some of the employees who had been dismissed from the company were in the plant electioneering for the A F of L.

Q. Did you do anything pursuant to that information?

(Testimony of Cecil R. Carter.)

A. I immediately went through the plant to find them. I went through the northern side of the plant first, came [609] back through the middle building, and then went to the "TA" Warehouse where I found them.

Q. What occurred?

A. Well, there was about 20 or 25 employees grouped around Mr. Harvey Howard, Mr. Dave Luchsinger and Mr. Lomberg.

Q. Were those employees supposed to be at work at that time?

A. They were supposed to be working at that time.

Q. What, if anything, did you do?

A. I motioned to Mr. Luchsinger, and he came over, and I asked him if he had permission to come in the plant. He said, "No," and I reprimanded him and told him that he had worked there long enough, than he knew better than to come into the plant and bring other people in the plant without getting permission. I told him that I would have to escort him to the gate, they would have to leave until such time as they got permission to come in.

Q. You say you escorted them to the gate. Did anything occur at the gate?

A. Going over to the gate either Mr. Luchsinger or Mr. Lomberg called attention to Mr. Howard that one Mr. Carlisle Harrison was standing on the dock of "A" Building, and Mr. Howard—

Q. (Interposing): Can you identify Mr. Carlisle Harrison [610] a little?

(Testimony of Cecil R. Carter.)

A. Mr. Carlisle Harrison was a former employee of the Company, but he was not at that time. And I understand, after investigating, after escorting the gentlemen to the gate, I investigated and he was brought in there by Mr. Gleichman.

Q. And what did you do when Mr.—whoever it was that called your attention to Mr. Harrison—what did you do with respect to that, if anything?

A. I didn't get that.

Q. Well, when your attention was called to Mr. Carlisle Harrison, did you do anything?

A. Mr. Harvey Howard immediately turned around to me and said, "It is mighty funny that the company will allow the other side in here but won't allow us in."

I said "I didn't know Mr. Carlisle Harrison was in the plant, and I will investigate him the same as I investigated you, and if he has no business in here he will be escorted to the gate the same as you are."

Q. What occurred, if anything, after that?

A. I then went upon the dock and asked Mr. Harrison what business he had in the plant. He told me he was brought in by Mr. Gleichman, he was hired by the union to come out there in order to show Mr. Gleichman the employees and help him check their books. [611]

I then asked Mr. Chuck Grube the same question, and he replied the same thing. And we went to Mr. Gleichman, and he told me the Union was paying Carlisle Harrison to come out there and help him,

(Testimony of Cecil R. Carter.)

and he had just as much right in the plant as he did, and according to the contract for the company he had a right to enter that plant at any time to check dues books.

Q. That is what Mr. Gleichman told you?

A. Yes, sir.

Q. Anything else occur?

A. I then went to the telephone and called Mr. Wood and told him what had happened, and Mr. Wood asked me to go to Mr. Gleichman and ask him to ask Mr. Harrison to leave the plant, rather than have him in there and cause any trouble.

So I went to Mr. Gleichman and asked him, and he got quite peeved over it. And he said he wanted to talk to Charlie Wood on the phone. So we went back and called Charlie Wood again, and they had quite a conversation over the phone. And finally he told me that Mr. Wood wanted to talk to me. So I talked to Mr. Wood on the phone then, and he asked me if I had time to go with Mr. Gleichman and Mr. Harrison and stay with them until they left the plant, and see that they did no electioneering. I told him I had the time to do it, and I did. We went through the plant and I heard no electioneering from either one of them. [612]

Q. Now, before that time, when you escorted Mr. Howard and Mr. Luchsinger and Mr. Lonnberg to the gate, was there anybody at the gate at that time?

A. We had a watchman at the gate.

Q. Do you recall his name? A. Otto.

(Testimony of Cecil R. Carter.)

Q. Did any further conversation ensue between yourself or, rather, strike that.

Did any conversation occur between yourself and Mr. Lonnberg in the presence of Mr. Luchsinger and Mr. Lonnberg and Mr. Howard?

A. With Mr.—

Q. In the presence of Mr. Lonnberg with respect to the way they got into the plant?

A. I asked Otto, "What is the idea of letting these men into the plant without them having permission to come in?" and his remark to me was, "I can't see everything."

Q. Did any of these men say anything; Mr. Luchsinger, Mr. Harvey Howard, or Mr. Lonnberg?

A. Nothing that I know of to the watchman.

Q. To yourself?

A. Well, they remonstrated with me quite fiercely on escorting them to the gate, and Mr. Harvey Howard says, "By the way," he says, "what is your name?" I said, "My name is C. R. Carter," and he said, "Well, you haven't heard the last [613] of this." He says, "You will hear more about this." I said, "I work here six days a week."

Q. Do you know what Mr. Harvey Howard's capacity was?

A. It was the first time I had ever met Mr. Howard.

Q. You did not know what his functions were with respect to Mr. Luchsinger and Mr. Lonnberg?

A. I had heard that he was their organizer.

Q. Has any foreman in your department re-

(Testimony of Cecil R. Carter.)

ported to you any incidents where workers in the plant were threatened for wearing A F of L buttons or distributing A F of L literature?

A. No foreman under me has made such a report to me.

Q. Did any worker personally make such a report to you? A. No, sir.

Mr. Hecht: May I have a moment's recess, Mr. Examiner?

Trial Examiner Ruckel: Yes, we will recess for five minutes.

(A short recess was taken.)

Trial Examiner Ruckel: Any further questions by the Respondent?

Mr. Hecht: Yes, sir, Mr. Examiner.

Q. (By Mr. Hecht): Mr. Carter, do you know Mr. Nick Tate? A. Yes, sir.

Q. He was an employee at your plant?

A. He worked in the Raw Stock Department under Mr. Harvey Nelson as foreman. [614]

Q. Calling your attention to the week prior to August 26, did you see Mr. Nick Tate engage in a conversation with Mr. Gleichman, the man who is here, anywhere in the plant? A. No, sir.

Q. Did you specifically hear Mr. Gleichman accuse, or rather, charge Mr. Nick Tate with being an A F of L organizer? A. I did not.

Q. Calling your attention to September 1, 1945, were you at the plant? A. Yes, sir.

Q. Will you tell me if anything unusual occurred

(Testimony of Cecil R. Carter.)

that day? I have reference, Mr. Carter, to the picket line incident outside the plant?

A. Oh, I don't—I couldn't connect any of these dates with any of these times.

Q. Well, you recall the incident?

A. I recall the incident.

Q. Will you relate what occurred to the best of your recollection?

A. Well, the night before Mr. Altman asked me if I could come down to the plant early the next morning, that he had heard that the Business Agents from the CIO were going to check the books on all the employees coming in the gate. And I asked him what he meant by "early," and he said, "six o'clock." I told him I could. [615]

Q. By the way, what time does work start in the morning? A. 7:30 the whistle blows.

Q. Go on, Mr. Carter.

A. I got to the plant possibly a couple of minutes after six o'clock and went to the front gate and there was nobobdy there, nobody from the union had showed up yet. And I thought it was funny that they were supposed to be there at six o'clock. And I don't think they showed up until it was close to six-thirty, as I remember. It could have been a little after or a little before. I don't remember exactly.

Q. By "union men" you mean representatives of the ILWU? A. Yes.

Q. And do you recall the names of any of those ILWU representatives?

(Testimony of Cecil R. Carter.)

A. Mr. Gleichman was there, and quite a few men that I have never seen before.

Q. Yes. Did they enter the plant?

A. They did not.

Q. Did they take any place near the plant? A. They stopped at the front gate.

Q. How far away would you say?

A. Well, right at the gate, I would say.

Q. Is there a sidewalk next to the gate?

A. There is a sidewalk to one side of the gate. It stops there. The gate is an automobile driveway. [616]

Q. Yes. And what else occurred, if anything?

A. When Mr. Gleichman came there he asked me if anybody had come in yet, and I told him there were two or three employees had already gotten in, and I named them to him. And he sent one of the men—I couldn't say who—to go in and check those employees' books that had already gotten in.

Q. Anything else of note occur?

A. Well, when the employees started coming in these union men stopped each one as they came in and asked for their union books, and after they looked at them, why, they came on in the plant.

Q. I think you have told me that the Berkeley police eventually got to the plant?

A. Well, after the employees got to coming quite fast they couldn't check the books fast enough, and the automobiles started backing up in the street. That was a little later on.

(Testimony of Cecil R. Carter.)

Q. That is plant employee automobiles?

A. That is right. And the Berkeley police were there, and this officer came up and told them they couldn't block the city streets, that they would have to let the cars through. So then the union men came inside the gate and started checking the cars after they came through the gate.

Q. And how long did this take? When did it end, if at all?

A. Well, the whistle blows at 7:30, and I think, as close [617] as I can remember, I think they left shortly after eight o'clock.

Q. Yes. At that time, did you hear any union representative make any threat to any of the employees?

A. One of the employees came up there and was quite mad about it and wanted to push his way through, and said they had no right to stop him; a man by the name of Stone.

Q. Yes.

A. And they finally told him he could not go in unless they saw his book. I don't know whether he got his book out and showed it to them or not, but he finally went on in the plant and went to work.

Q. Any other incident of similar nature, do you recall?

A. That is the only one that I know that ran into trouble. There were some of the others that didn't go in, though.

Q. Yes.

(Testimony of Cecil R. Carter.)

A. They were handed letters and told they couldn't go in.

Q. Were you aiding the union officials in this check-up? A. I was not.

Q. Did you yourself prevent any employee from coming into the plant? A. I did not.

Q. Do you know an employee by the name of Alden Lee? A. I do.

Q. Did Mr. Alden Lee on this very day say to you, "What [618] the hell is going on here?"

A. Something to that effect.

Q. And what did you say?

A. I said, "They are checking up on union books."

Mr. Hecht: That is all.

Trial Examiner Ruckel: Questions by the CIO?

Mr. Edises: No questions.

Cross Examination

By Mr. Royster:

Q. Mr. Carter, have you seen Mr. Gleichman in the Respondent's plant on more than one occasion? A. I didn't get the first of that.

Q. Have you seen Mr. Gleichman in the plant on more than one occasion?

A. I have seen him numerous times.

Q. Have you seen Mr. Duarte in the plant?

A. I have.

Q. Have you seen Mr. Gonick in the plant?

A. I have.

(Testimony of Cecil R. Carter.)

Q. Have you ever seen them in the plant unaccompanied by any representative of the management? A. Yes.

Mr. Royster: That is all.

Mr. Rowell: No questions.

Mr. Hecht: Just one more question.

Redirect Examination

By Mr. Hecht:

Q. Mr. Carter, did you form any opinion as to why there was this check-up of dues books?

Mr. Royster: I am going to object to that. I don't think it is material.

Trial Examiner Ruckel: This man took no part in determining the discharge, did he?

Mr. Hecht: No, but, as I understand it, testimony was admitted here on the ground he was part of this company's state of mind.

Mr. Royster: I tink I can say that none of the Board's testimony was to show the state of mind of Mr. Carter.

Mr. Hecht: Well, the testimony as to the threat or the accusation against Mr. Tate was tied up to Mr. Carter, and I assume that the reason for tying it up is to show knowledge on the part of the company.

Mr. Royster: Yes, but I don't think your premise follows from that.

Trial Examiner Ruckel: It is a little different. read the question, please?

(Testimony of Cecil R. Carter.)

(The question referred to was read by the reporter.)

Trial Examiner Ruckel: He may answer.

A. I was told by a Union Business Agent (as I remember, Mr. Gleichman made the statement) that the dues books were in such a mess that it was going to be an awful headache getting them straightened out. [620]

Q. (By Mr. Hecht): You formed no opinion, but this was stated to you?

A. That is all I had to go by.

Mr. Hecht: That is all.

Mr. Rowell: Could I ask one question?

Recross Examination

By Mr. Rowell:

Q. You mentioned the delivery of these letters, letters by the CIO Union.

A. I didn't hear the first part of your question.

Q. I was asking about these letters. I think you testified that the CIO Union people at the gate delivered some letters to certain of the employees as they came to the gate.

A. That is right.

Q. Is that right? A. That is right.

Q. These letters, they had them prepared already in their hands?

A. They were in an envelope.

Q. They would pull the out of the envelope and deliver them to these people?

A. They handed the employees the envelope, and

(Testimony of Cecil R. Carter.)

the ones they handed the envelope to, they told them they couldn't go in.

Mr. Rowell: That is all.

Mr. Royster: Nothing further. [621]

Trial Examiner Ruckel: That is all.

(Witness excused.)

Mr. Hecht: Mr. Stanberry, will you take the stand, please?

DON E. STANBERRY

called as a witness by and on behalf of Colgate-Palmolive-Peet Company, Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hecht:

Q. Mr. Stanberry, will you give your name for the record, please?

A. Don E. Stanberry, S-t-a-n-b-e-r-r-y.

Q. And what is your business or occupation?

A. I am Production Supervisor, Colgate-Palmolive-Peet Company, Berkeley.

Q. And how long have you been employed at Respondent's plant? A. Since 1935.

Q. And you were employed in your present capacity all during the months of July, August, and September? A. I was.

(Testimony of Don E. Stanberry.)

Mr. Hecht: Mr. Examiner, I am sorry. May I recall Mr. Carter?

That is all right. Let it go.

Q. (By Mr. Hecht): Do you know a Mr. Albert Zulaica? [622] A. I do.

Q. During the month of August did Mr. Zulaica come to you with a complaint about having been threatened for wearing an AF of L button and electioneering for AF of L?

A. Perhaps, direct; either directly or indirectly. I don't remember whether it was directly from him or through his foreman.

Q. Do you recall the nature of the complaint?

A. Well, the complaint was that Charles Leacock and other identified colored people were threatening the men at night.

Q. Was the reason for the threat given you?

A. I believe they stated it was connected with wearing AF of L buttons.

Q. Did you take any action in connection with that? A. I did not.

Q. Did you speak to Mr. Zulaica about the matter? A. Yes, I did.

Q. By the way, what was Mr. Leacock's position?

A. Mr. Leacock was porter, and he was also a CIO Steward.

Q. I take it Mr. Leacock did not hold any foreman's position, any supervisory position?

A. He held no supervisory position whatsoever.

Q. Did you hold a conversation with Mr. Zulaica

(Testimony of Don E. Stanberry.)

with respect to his dealings with Mr. Leacock? [623]

A. Yes, I did.

Q. And will you give us the burden of the conversation?

A. Well, it was more in the nature of a request from Zulaica for advice as to what to do in the situation, the general situation as well as this particular incident. And I went over the whole situation with him from beginning to end, and pointed out that the best legal advice we had been able to obtain substantiated the fact that our present CIO contract was valid, and that that required that anyone working for the company would have to be a member of the CIO Union, and also be in good standing. I also pointed out that what meant to be in good standing we did not know, and the union had never told us the exact reason for the previous dismissals or suspensions, I should say, other than that they were not in good standing.

Q. Did you advise him that Mr. Leacock had as much a right to express an opinion in the controversy as anybody else?

A. That is quite true.

Q. Did you advise him to avoid controversy with Mr. Leacock?

A. Well, I told him the best thing was to try to smooth it over as easily as he could.

Q. Mr. Stanberry, were you in the plant September 1, 1945?

A. September 1? Yes.

Q. Yes. Do you recall the occasion when something like 18 [624] employees were called into Mr. Railey's office?

A. Yes, I was there.

(Testimony of Don E. Stanberry.)

Q. And do you recall Mr. Railey stating that he had never wanted a union in the first place, that now the employes had it they had to take the consequences?

A. I did not hear him make such a statement.

Q. Did you hear anything substantially to that effect? A. I did not.

Q. Did you hear either Mr. Railey or Mr. Wood or Mr. Altman, or either of them, state that the reason they were in such a mess is because they were wearing AF of L buttons? A. I did not.

Mr. Hecht: I think that is all.

Mr. Edises: No questions.

Trial Examiner Ruckel: Questions?

Mr. Royster:: No questions?

Mr. Rowell: No questions.

Trial Examiner Ruckel: That is all.

(Witness excused.)

Mr. Hecht: Mr. Wood.

Mr. Wood: Do you swear me again, or have I been sworn?

Trial Examiner Ruckel: You have been sworn, so I won't swear you again.

CHARLES WOOD

called as a witness by and on behalf of Colgate-Palmolive-Peet [625] Company, Respondent, having been previously sworn, was examined and testified as follows:

(Testimony of Charles Wood.)

Direct Examination

By Mr. Hecht:

Q. Mr. Wood, you have already stated your name, haven't you? A. Yes, sir.

Q. And you have already given your employment with the Respondent? A. Yes, sir.

Q. You have been employed approximately 25 years? A. 25 years.

Q. And in addition to your position or function as a Purchasing Agent, what other functions do you perform for the Respondent?

A. I handle the labor relations.

Q. Will you expand a little more on that, if you will?

A. Well, I attend to the negotiations with the committee, make the decisions with respect to the labor matters.

Q. Yes. And, if it isn't digressing too far, I do not direct the labor in the factory. After the help are in there, why, the factory people handle it. I have nothing to do with that. But if a dispute comes up that is of sufficient importance so that it cannot be settled by the foreman and a meeting is necessary, I take charge of that meeting and make the company's decisions. [626]

Q. Mr. Wood, were you at the plant— let's put it another way.

Were you in Berkeley on July 26, 1945?

A. I was.

(Testimony of Charles Wood.)

Q. Did you have any knowledge of the dinner meeting held by the employees on July 26?

A. I did not.

Q. Were you in the plant July 28?

A. No, sir.

Q. Where were you on July 28?

A. At home.

Q. Did you arrive at the plant at all?

A. I didn't visit the plant at all.

Q. Did you on that day call Mr. Altman, or did Mr. Altman call you?

A. I called Mr. Altman.

Q. How did you come to learn of the notice posted on July 28, 1945?

A. When I called him I asked him if there was anything doing, and he told me "No." Having in mind— well, I don't know whether I ought to say that or not. So much goes here I don't hardly know where to stop.

Mr. Royster: Well, nobody stopped you.

Mr. Hecht: Will you read Mr. Wood's partial answer?

(The answer referred to was read by the reporter.) [627]

Q. (By Mr. Hecht): Well, Mr. Wood, did the notice, or the advice you received with reference to the notice, mean anything to you?

A. It did not.

Q. Did the title "Employees Welfare Association" suggest anything to you?

(Testimony of Charles Wood.)

A. Well, somewhat vaguely. I had in mind that perhaps they were getting up some sort of a welfare association. They have similar things in other plants, independent of the unions, that have credit facilities for men banking.

Q. To put it in other words, Mr. Woods, it didn't strike you as a collective bargaining agency?

A. Not at all, not at all.

Q. Yes. On July 29 were you in Berkeley, or at the plant? A. I was not.

Q. On July 30? A. No.

Q. On July 31? A. No.

Q. Where were you on those dates?

A. At Portland.

Q. At Portland. While at Portland did you come to hear of some of the matters that have been testified to here? A. Yes, sir.

Q. Who advised you as to them? [628]

A. Could I ask you to be a little more explicit?

Q. Who told you about it?

A. Well, the first thing, I had been unable to get the plant on the phone all day. The telephone lines were badly congested, evidently. It was a Monday, about eight o'clock at night I succeeded in getting Mrs. Sellers, my secretary, on the phone, and discussed certain matters pertaining to purchasing with her, materials. We were badly short of many critical materials at this time. And she says, "Have you heard from anybody that they let out a number of men today?" I says, "No, I did not."

(Testimony of Charles Wood.)

Q. What date was this, Mr. Wood?

A. That was on July 30.

Q. Yes. A. Late in the evening.

Q. Did you eventually hear from Mr. Railey or Mr. Altman?

A. Not until the following morning.

Mr. Royster: The witness has not concluded his testimony with respect to what he heard from Mrs. Sellers.

The Witness: Do you want the conversation from Mrs. Sellers?

Trial Examiner Ruckel: Have you finished your conversation on the phone with your secretary?

The Witness: Yes, except she said that they were the stewards that were let out. I asked her if she knew why. She [629] said, "No," that they had been busy all day and hadn't got the particulars.

Q. (By Mr. Hecht): Did you eventually talk to Mr. Altman or Mr. Railey?

A. I talked to Mr. Railey.

Q. And what information——

A. (Interposing): The following day.

Q. That is July 31? A. Yes, sir.

Q. What information, if any, did he give you with reference to the incidents of July 30 and 31?

A. He told me the story of what has been testified here today.

Q. Testified by Mr. Railey or the other persons here?

(Testimony of Charles Wood.)

A. Well, he told me that— well, may I tell the story, what he told me?

Q. Well, concisely, if you will.

A. Yes. He told me that the day before, early in the morning, the CIO had demanded the release of Messrs. Marshall, Smith, Haynes, Luchsinger, and Moreau. And I asked him why. Well, he said they brought out a letter demanding that we release them as they were not in good standing with the union, and they could not be employed until the matter of their suspension had been determined. He read the letter to me, in fact. [630]

Q. Did you inquire of Mr. Railey whether he had asked the reason for their not being in good standing?

A. I asked him if he knew what was back of it all, and he said he didn't, that he was at a loss to understand it.

Q. When did you return to Berkeley and to your occupation?

A. I arrived on the Cascade, that got in around two o'clock on August—Wednesday, August 1. I—let me coordinate those dates. I think that is right.

Q. Did you go to the plant?

A. I went to the plant immediately.

Q. And what did you find there?

A. I found the plant shut down.

Q. And for how long was the plant shut down, Mr. Wood?

(Testimony of Charles Wood.)

A. The plant was shut down that afternoon and the following day.

Q. In other words, there was a work stoppage at the plant? A. A work stoppage, yes.

Q. Were you aware at that time, Mr. Wood, that the ILWU had a no-strike pledge for the wartime?

A. I was very well aware of it.

Q. Did you get any information from any source respecting the work stoppage and the suspension of the five stewards and four committeemen from any source at that time when you returned?

A. From Mr. Railey. [631]

Q. Did he expand further on what he told you over the phone?

A. No, he told me substantially the same thing. He told me the history of everything that had happened up to date, how he had gone to the meeting, and the meetings that had been held, that he knew of.

Q. Did you have any opinion as to the probable cause for the discharge of the five stewards, Mr. Wood?

A. Well, not definite at that time at all.

Q. On what was it based?

A. I beg your pardon?

Q. On what was it based, such opinion as you had?

A. Well, I knew of the no-strike pledge, I had heard that the stewards had been in difficulty with the union for not carrying out the anti-racial discrimination policy.

(Testimony of Charles Wood.)

Q. Had you heard of any previous trouble that the stewards had had with the union, directing your attention to about December, 1944?

A. December, 1944?

Q. Maybe I am in error as to the date.

A. Well, that is a long time back, that was nearly a year. I had heard of— I had heard that the Stewards had been summoned before the— some regulatory body of the union and censured for not carrying out the anti-racial discrimination policy, but whether it was December or not, as far back as that, but it was quite a long period before the first of August back.

Q. Had you heard anything in connection with failure to check on dues paying?

A. I had not at that time.

Q. Had you heard anything in connection with failure to get the men who were not ILWU to come into the ILWU?

A. Not at that time.

Q. Not at that time. Did you and Mr. Railey do anything about getting legal counsel in connection with the interpretation of your collective bargaining agreement with the ILWU?

A. Yes, sir.

Mr. Rowell: Well, Mr. Examiner, that is a similar inquiry that I tried one time.

Mr. Hecht: That state of mind of these persons, Mr. Examiner.

Mr. Edises: A question of good faith enters in here, Mr. Examiner.

(Testimony of Charles Wood.)

Trial Examiner Ruckel: He may answer.

A. Yes, we did.

Q. (By Mr. Hecht): And what is it you did?

A. Well, when I returned Mr. Railey showed me a letter from Clark & Heafey.

Q. What are they?

A. Attorneys. They had been our regular attorneys in [633] Oakland. In which they advised that——

Mr. Royster (Interposing): May I interrupt here? It seems to me that it is perfectly pertinent to show that the company sought legal advice, and I think that has been shown. Now, it seems to me further that it can only be shown that the company did or did not act in accordance with that advice. Now, just what they did, or what the advice was——

Mr. Hecht (Interposing): Yes, I will cut that short, Mr. Royster.

Q. (By Mr. Hecht): And did you act in accordance with that advice? A. We did.

Q. Directing your attention to Section 3 of the contract, were you advised that you had to comply with the terms of that Section 3 strictly?

A. We were.

Q. Were you further advised that you could not set yourselves up to judge the justice of putting these men in bad standing? A. We were.

Q. And you acted accordingly?

A. We did so.

Q. Were you at the plant on or about August 17, 1945? To refresh your recollection that is the

(Testimony of Charles Wood.)

date when the 9, to-wit, the five stewards and the four committeemen, came and [634] asked for their employment? A. Yes, sir; yes.

Q. Well, will you relate in your own words, give your version of that incident?

A. I was in my office, and Mr. Altman came and said, "Will you come over to my office with me? Those nine fellows"—I think was his language—"that were suspended are over there and want to go back to work."

I retired to his office with him, and there were that group. Do I need to name them?

Q. No, we know who they are already sufficiently.

Trial Examiner Ruckel: No.

A. The group were in there, and they were in their working clothes. Some of them had their lunch boxes with them. And Mr. Sherman, with a gesture of both hands, says, "Well, we are here to go to work." And, to the best of my recollection, I fell back on our legal advice, that "We have a contract with the CIO, and you have been suspended on their order for violation of the constitution and by-laws, and we must observe that contract. I am very sorry, but I don't see how we could put you back to work under the conditions. You will have to remain out until the issue has been determined between you and the CIO."

Q. Calling your attention, Mr. Wood, to August 30, 1945, did you on that date have a conversation with Mr. Hack [635] Gleichman?

(Testimony of Charles Wood.)

A. I think so, there about that date anyway.

Q. Will you tell us the substance of that conversation as well as you can recollect it?

A. Well, my recollection of the conversations of August 30 and 31 are pretty well merged together. If it is permissible——

Q. (Interposing): Well, if you can, please give it to us chronologically. Let's stick first to the August 30 events, if you will.

A. Well I think it was August 30 that he came to me and he had a list of employees that he wanted us to let out. It was a long list. He had two sheets of this eight and a half by thirteen blue-lined paper such as we are using here, and in addition to that a first sheet that was in front of the others that had been torn off, and he had, maybe, a quarter or a third of that sheet at the top of the paper, and he had a list of names there. and he handed me that—wanted to hand me that sheet of paper, and demanded that we release that group immediately. I didn't take the sheet from him, but I wanted to see what was on it, nevertheless. And as he turned the sheet, I noticed that the first page was completely filled with names, I might say the first part of a page was completely filled with names, the second page was completely filled, and the third page was filled down within maybe five or six lines of the bottom of the page. And he says, "These [636] people here are in bad standing, and some of them, their dues aren't paid," and he says, "We want you to let them out right off."

(Testimony of Charles Wood.)

I laughed at him and told him to "Go to hell," and that I was not going to act on any such order, that if he had anything like that, that I wanted a letter from the union signed by some duly authorized officer, notifying us to that effect.

Well, he says, "I will get you one." I said, "Well, this thing has gone too far. You are getting too many people involved here. Why, the first thing you know, if this keeps on, we will be shut down," and I says, "I want to talk to Mr. Heide about this thing before we get into this thing any deeper."

He says, "All right, I will see if I can get him to come out here," and Mr. Heide came out, and we discussed the thing. And I pointed out again to Mr. Heide—he had Mr. Duarte with him, that it was taking too many men out of the plant, and that it was seriously—any such number of men would seriously interrupt our operations, that there were men there in key positions.

Well, he, Heide, arose and said, "Well, we will talk it over and let you know."

Now, afterwards I counted on one of my own sheets the number of lines on those sheets, and from the number of names, [637] the appearance of the sheets, the number of names, I estimate that the sheet that Mr. Gleichman wanted me to take to let them out——

Pardon me. Let me start over again.

I would estimate that the number of men that he had on the sheets which he wanted me to take and then let out that group of men comprised be-

(Testimony of Charles Wood.)

tween, oh, 60 and 65 names; maybe possibly 70.

Q. Did you count the names on Mr. Gleichman's sheet, Mr. Wood?

A. I observed that the first sheet was 25 or 30 per cent filled.

Q. Yes.

A. No, that was 25 or 30 per cent of the length of the full sheet was filled with names, the second sheet was filled with names, the third sheet was filled with names down to within, oh, two or three inches of the bottom of the page.

Q. Did Mr. Gleichman give you any reason for wanting to have you remove these men?

A. Well, he said they were in bad standing, that they were no good, and that they—a lot of them weren't up in their dues, and I terminated the conversation as quickly as I could.

Q. Well,—

Mr. Rowell (Interposing): Let him finish his answer. He [638] is doing fine.

Mr. Royster: This is very interesting.

Q. (By Mr. Hecht): Can you be a little more concise, Mr. Wood?

The Witness: Would you read back my answer?

(The answer referred to was read by the reporter.)

The Witness: In addition to that, I think he said there were a large number that were not members of the union.

Q. (By Mr. Hecht): I see.

A. I think that is about the substance of the con-

(Testimony of Charles Wood.)

versation, except he kept reiterating his demand that we release the whole list.

Q. Eventually did you get a letter from the union? A. We did.

Q. On what date?

A. Mr. Altman reported to me that that morning, over the phone, he had received a letter from the union demanding the release of, I think it was 18 men. It might have possibly been 19. I have forgotten. That it was handed to him by Mr. Gleichman.

Q. Yes. And that is the number of men that you called into your office, I believe, on September 1? A. Yes, sir.

Q. Will you tell me what occurred on that occasion?

A. Well, I told Mr. Altman to—— [639]

Q. (Interposing): Oh, let me digress for a moment.

When you were handed that list of 17 men did you again seek legal advice?

A. When Mr. Altman phoned me that he had that list of names I told him—I was not at the factory, I was home—that was again a Saturday. I do not usually go to the plant on Saturdays.

Q. Yes.

A. And I told him, “Sit tight until he heard from me.”

Q. Yes.

A. I attempted to contact Mr. Crum, who was

(Testimony of Charles Wood.)

our attorney, and he was out of the city. I was advised, I think, that he was at his summer home. I was unable to get him. Mr. Altman called me again, and I told him to continue to wait, that I wanted to get hold of Heide and see if we could prevail upon him to cancel the request.

Well, he says, "Mr. Gleichman is putting the heat on me pretty heavy for immediate action." Well, I says, "He is not offering to kill you," or words to that effect. And he says, "No." Well, I says, "You sit tight until you hear from me."

I think there were several such conversations until about 1:30 Mr. Altman called me again and says that he was unable to hold Mr. Gleichman off any longer, that he wanted to—us to take immediate action. Well, I says I had been [640] trying to get Mr. Heide and I had been unable to do so. "I think I will come down."

Well, he says, "Do you want me to call Railey and get him to come over?" Well, I says, "I think that will be a good idea. You might get him at the Claremont Country Club."

He called the Claremont Country Club and evidently got Mr. Railey.

I changed my clothes and shaved and came down to the plant and found Mr. Railey there in his office when I got there. I was shown the letter, and we discussed the procedure that we would follow to let out such a large group of men.

Mr. Railey wanted to soften the blow as much as possible. A lot of them had been there a long time

(Testimony of Charles Wood.)

and he didn't like them to think we were just throwing them out without any consideration. So it was decided that we would call them down into his office. And Mr. Altman took the responsibility of having all these people notified that they should come down. It took some little time to gather them. But after they got there, why, we showed them the letter and told them that we were very sorry but under the terms of our contract we had no alternative except to abide by its terms.

Q. Were Mr. Carter and Mr. Stanberry there?

A. Mr. Carter and Mr. Stanberry were in the office, Mr. Railey was there, Mr. Altman, was there, and these 18-odd people that—I don't need to recite their names, do I? [641]

Q. No. Did you at any time during the course of that meeting state to anyone present that the reason they had gotten into this mess was because they were wearing A. F. of L. buttons?

A. I did not.

Q. Did you hear Mr. Railey make such a statement? A. He did not.

Q. Did you hear Mr. Altman make such a statement? A. I did not.

Q. Is it possible that they could have made such a statement and you can't remember it now?

A. I would have remembered it if I heard it.

Q. Did you hear Mr. Railey state that you hadn't wanted the union in the first place and the employees now could take the consequences?

A. Mr. Railey made no such statement.

(Testimony of Charles Wood.)

Q. Was anything said by any one of these 18 employees that were there present at the time?

A. Well, I should say so. When they first started, came in, Mr. Railey said a few words to them, and then he asked me to sit down in his chair and explain to them the whole situation. I read the laws out of the contract, and told them again—as a matter of fact, I think that statement was made repeatedly in the meeting, that under the terms of the contract we had no alternative except to accede to the demand [642] of the union with respect to suspending these men until the case had been settled. The longer the meeting lasted, why, the louder it grew, and it was not a great while before everybody was talking in loud tones of voice, and except the people you were talking to it would be very difficult to tell what anybody else was saying.

Q. Mr. Wood, you were present here when Mrs. Kay Norris made the statement——

A. I was, yes.

Q. Or, rather, testified that she made certain statements to you. Did you make such statements?

A. I have forgotten what they were.

Q. She had asked you whether the reason they were being put in bad standing was because they had worn A. F. of L. buttons and distributed A. F. of L. literature?

A. I don't remember of her having said that.

Trial Examiner Ruckel: Just a moment.

Q. (By Mr. Hecht): You have heard her testimony that you said, "Maybe that is the reason?"

(Testimony of Charles Wood.)

A. No, I don't recall any such statement.

Q. I see. When you called Paul Heide about this list of 18 did you ask him the reason why these men and women were being put in bad standing?

A. I did.

Q. What answer did you get from Heide? [643]

A. He said that they had violated their oath, the constitution and by-laws and their oath of office, their office of—the oath they took upon initiation; excuse me.

Q. Did you make a bona fide effort, Mr. Wood, to press Mr. Heide for further details?

A. I certainly did.

Mr. Royster: I object to the form of that question.

Trial Examiner Ruckel: Objection sustained.

Q. (By Mr. Hecht): Well, did you make any further effort?

A. I made further ones, yes, and I had made previous ones.

Q. And that is the most satisfactory answer you got?

Mr. Royster: I object to that. That is leading, for one thing, and suggestive.

Q. (By Mr. Hecht): Well, that is all you got?

A. That is the only answer I ever got.

Q. All right. On September 1, 1945, or let us even carry it further, September 15, 1945, had you, Mr. Wood, formed any definite opinion for the reason why these men were being put in bad standing by the union?

(Testimony of Charles Wood.)

A. No, I hadn't. I was somewhat bewildered.

Q. What was the reason for your bewilderment?

A. Well, I didn't think that it was only for union activities alone, or anti-union activities alone, because many people had not been disturbed that I had observed wearing buttons and passing out literature. [644]

Trial Examiner Ruckel: What kind of buttons and what kind of literature?

The Witness: The A. F. of L. buttons.

Q. (By Mr. Hecht): Are some of those persons still in your employ, Mr. Wood? A. They are.

Mr. Hecht: Do you gentlemen care for the names?

Mr. Royster: I don't want them.

Trial Examiner Ruckel: What is the question?

Mr. Rowell: The question is, who passed out A. F. of L. buttons in the plant.

Mr. Hecht: That are still in the employ of the company.

Trial Examiner Ruckel: What was your question?

Mr. Hecht: I was asking the gentlemen——

Mr. Rowell (Interposing): If he knows them.

Mr. Edises: I submit it would be a matter of development by counsel for the prosecution if they have any questions as to——

Trial Examiner Ruckel (Interposing): I think we better leave it there. I think it is of some importance that there were others who wore buttons and passed out literature whose discharge was not

(Testimony of Charles Wood.)

requested. It might have been that they subsequently got themselves in good standing. I don't know.

Q. (By Mr. Hecht): Did those persons, Mr. Wood, to whom you have reference, continue to wear the A. F. of L. button and [645] pass out the A. F. of L. literature up to and including the date of the election? A. They did, sir.

Q. Are those persons still in your employ?

A. They are.

Mr. Hecht: Mr. Examiner, may we go off the record?

Trial Examiner Ruckel: We will recess for 10 minutes.

(A short recess was taken.)

Trial Examiner Ruckel: Read the last question and answer, please.

(The question and answer referred to were read by the reporter.)

Trial Examiner Ruckel: Any further questions?

Mr. Hecht: Yes, Mr. Examiner.

Q. (By Mr. Hecht): Reverting to that meeting, so-called, of September 1, 1945, have you covered all of what was said in your recollection at that meeting, Mr. Wood?

A. Well, having in mind the statement that Mr. Railey is accused of making, I recall that Kay Norris started quite a discussion about the legality of the contract, and said that she had taken—had legal advice, she had a lawyer of her own that knew more

(Testimony of Charles Wood.)

about it than our lawyers or the CIO lawyers either, and that they said that the contract was no good. And throughout the whole meeting there was a whole lot of recriminations all over the room. You heard different [646] people saying that the officers of the CIO were a bunch of Communists and a bunch of crooks and they didn't properly account for the money, and she was among those that said it. And then the remark was repeatedly made, "Well, what good has the union done us for the last three years? We have been paying dues month after month and they haven't gotten us any raises in pay."

Well, I turned to her then and I said, "Well, it is your union; it is not ours."

Trial Examiner Ruckel: Did you say something about having selected the union in the first place, something to that effect?

The Witness: No, I did not.

Trial Examiner Ruckel: I think yesterday the word "selected" was used in some connection. I don't remember.

The Witness: No, I did not. I do not recall that language. I said, "It was your union." I might have said, "You picked it." I did say that it was not ours.

Q. (By Mr. Hecht): Mr. Wood, were you present yesterday or the day before (I don't recall) when Mr. Henry Hellbaum was present?

A. Yes.

Q. Do you recall his testimony? A. I do.

(Testimony of Charles Wood.)

Q. With reference to a conversation had with you? [647] A. Yes.

Q. Will you give us your version of that conversation and the incidents leading to it?

A. Well, somebody called me on the phone and told me that Hellbaum was down in the basement and was holding a meeting of the entire group of employees in that department. I think it was Grube that called me. Well, I says, "Run him out of there. They have no business doing that in working hours, and I will come down and talk to him."

I went down to the basement, and by the time I had gotten there the meeting had broken up, and Hellbaum was no longer there. I then went down to the boiler room and looked around for him. He was not there. And I asked where he was. I think one of the foremen, it was, that told me, "Well, you will find him in the Toilet Articles Department now."

I went over to the Toilet Articles Department, and he was there with a small group of employees. And I called him to one side and told him that the company had got to remain neutral, and that it was impossible to let him around assembling the employees for the purposes of electioneering."

Q. This was a work period at the plant?

A. A work period, yes.

Q. Was Mr. Hellbaum supposed to be at his work at that time?

A. Well, I also suggested that he better get back in the [648] boiler room where he belonged,

(Testimony of Charles Wood.)

that he had had a bad accident down there once and we didn't want a repetition of it.

Q. As to the five shop stewards and the four committeemen, did you eventually get word from the union, or from some union representative as to their status in the union, final status in the union?

A. I did.

Q. And what information did you get with respect to them, and about when, Mr. Wood?

A. Well, it was around, oh, I should say the middle of November. My memory is hazy when it occurred.

Q. Yes.

A. It might have been a little later, it might have been a little earlier, but I was told that they had refused——

Q. (Interposing): Who told you, Mr. Wood?

A. George Squires, one of the stewards, one of the present stewards in the plant, and who was steward at that time. I was told, as I remember it, that they had refused to stand trial and had been expelled from the union.

Q. Did he tell you as to the charges that had been made against them?

A. I think he did, that they had been derelict in their duty as stewards and hadn't carried out the anti-discrimination, racial discrimination policy, and that they had been involved in a strike during the war. [649]

Q. Yes.

(Testimony of Charles Wood.)

A. Controvening the no-strike pledge of the union.

Q. Did you eventually find out with respect to the status of the people who had been put in bad standing on August 30, 31, September 1?

A. I did.

Q. And on what date did you receive such information?

A. Oh, it was in early January, I would say.

Q. And who gave you that information?

A. George Squires and Ed Bopp told me, not together, but separately.

Q. And what was the nature of that information?

A. Well, that a certain number of them had stood trial and had been—had pleaded guilty and had been—there had been some arrangement made whereby they would be permitted to work out of the union hall.

Q. How about the others?

A. And that the others had refused to stand trial, and I believe that they had been expelled from the union.

Q. And were you advised specifically or generally as to the nature of the charges?

A. Yes, I asked them, and it was the no-strike pledge and also the anti-discrimination policy for some of them.

Q. Have you since that time heard anything else?

A. Well, I believe we got a notice from the

(Testimony of Charles Wood.)

union, too, [650] advising us of the results of the trial.

Q. Are you a subscriber to or do you receive the ILWU Dispatcher? A. I do, sir.

Q. Did you read an account of the so-called trial or hearing?

A. I read the account in that paper.

Q. All right. Have you ever been advised categorically by anyone that these men were placed in bad standing because of their A. F. of L. activities?

A. I was not.

Mr. Hecht: I think that is all.

Mr. Edises: I just have one or two minor things I would like to ask you about.

Q. (By Mr. Edises): You stated that the list that Mr. Gleichman showed you had—I think you mentioned the figure of around 75 or 74? Is it possible that the number on that list was 44?

A. It might be possible. I wouldn't be exact because I didn't have an opportunity to count them. It was just a glance taken trying to visualize the number of lines on the paper that were filled out.

Q. Yes.

A. And then counting them afterwards on one of my own sheets.

Q. O.K. In connection with this complaint made by Mr. [651] Grube, that there was a meeting being held, was that meeting being held in his department, Mr. Grube's department?

A. That is what he said.

Mr. Edises: That is all.

(Testimony of Charles Wood.)

Trial Examiner Ruckel: Questions by the Board?

Cross-Examination

By Mr. Royster:

Q. Has Board's Exhibit 7 ever been posted in your plant, Mr. Wood?

A. (Examining Document): I believe it was a mimeographed copy; mimeographed copies were made and handed to all the members.

Q. Was it ever posted on your bulletin board?

A. My recollection is that it was.

Q. Do you remember about when it was posted?

A. A few days after it was executed.

Q. Yes. That was in 1941? A. Yes.

Q. And do you recall how long it remained posted? A. I wouldn't pretend to say.

Q. Now, Mr. Wood, I am going to read a portion of a paragraph in Board's Exhibit 14 and then ask you a question about it. I am reading from Paragraph 4 of the appropriate unit: "—all production, maintenance, warehouse, mechanical and laboratory employees at the company's Berkeley, California, plant, including non-technical and non-professional [652] laboratory employees, watchmen, assistant foremen, and working foremen, but excluding office and clerical employees, chemists, foremen and all or any other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, con-

(Testimony of Charles Wood.)

stitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.”

Now, is that the bargaining unit which is now covered and has been covered by the contract with the ILWU?

Mr. Hecht: Don't answer, Mr. Wood.

A. I——

Mr. Hecht: Don't answer, Mr. Wood.

Trial Examiner Ruckel: There is an objection. The contract is in evidence.

Mr. Hecht: The contract is in evidence. That would be asking for the conclusion of the witness on a matter that the Board has to determine.

Mr. Royster: This witness is the manager and the director of labor relations.

Mr. Hecht: Do you want to qualify him and make him your own witness?

Mr. Royster: You qualified him.

Trial Examiner Ruckel: Let's hear counsel.

Mr. Royster: He is the director, as I say, of labor [653] relations for the company, and I certainly submit that he is competent to tell us what unit was covered by the ILWU contract.

Mr. Edises: We will join in the objection.

Trial Examiner Ruckel: What is the reason for the mental exercise?

Mr. Royster: I want to know whether or not foremen have been excluded from the coverage of that contract.

(Testimony of Charles Wood.)

Mr. Hecht: Well, you excluded them, not the manager of labor relations at this——

Mr. Royster: Well, Mr. Hecht, I know what the Board has done. I am asking this witness what the practice is.

Mr. Hecht: I still object to the question, Mr. Examiner.

Trial Examiner Ruckel: Well, the objection has been sustained to one question, but there is another question now concerning foremen.

Q. (By Mr. Royster): Mr. Wood, have foremen been included in the bargaining unit represented by the ILWU at your plant?

Mr. Edises: Objected to on the ground the contract speaks for itself.

Trial Examiner Ruckel: Objection sustained.

Mr. Royster: Well, let's see if the contract speaks for itself.

The contract says, Section 2, "The union is hereby [654] recognized as the sole collective bargaining representative for all employees covered by this agreement."

Now, does that sort of double talk describe a unit?

Mr. Edises: Well, now, I would like to point out.

Trial Examiner Ruckel: What is the relevance anyway?

Mr. Edises: I would like to point out to the Board's representative that if he is interested in the question of what employees are covered by the agreement there has been from time to time ex-

(Testimony of Charles Wood.)

cuted—not executed, but simply a list typed of agreed wage categories which shows the various persons who were covered by the agreement.

Mr. Royster: But, Mr. Edises, I believe that no such wage classifications are to be found in the contract as introduced and admitted in evidence, so, therefore, the contract does not speak for itself.

Trial Examiner Ruckel: Well, let's get down to cases. You are talking with reference to this foreman, whoever he is.

Mr. Hecht: Charles Grube, I imagine is the person, Mr. Examiner.

Trial Examiner Ruckel: Grube. Well, suppose that he is a member of the Union and not in the appropriate unit, what difference does it make?

Mr. Royster: Well, he is excluded from the unit because he is a foreman. [655]

Mr. Edises: I would like to know the significance of that.

Trial Examiner Ruckel: He can still belong to the union.

Mr. Royster: Certainly he can belong to the union, so can Mr. Wood belong to the union.

Trial Examiner Ruckel: Apparently Mr. Grube does belong to the union.

Mr. Royster: Yes. That doesn't make him by that fact alone not a representative of the company, and it doesn't excuse the company for anything that Mr. Grube may have done.

Trial Examiner Ruckel: Are you addressing yourself now to the so-called espionage allegations?

(Testimony of Charles Wood.)

Mr. Royster: Not necessarily. There is testimony in the record of several instances which concern Mr. Grube.

Mr. Edises: I submit that my recollection is that Mr. Grube was mentioned in connection with this incident of sitting outside the union hall.

Mr. Royster: He was.

Mr. Hecht: He also was mentioned by Mr. Hellbaum. Mr. Hellbaum charges Mr. Grube with telling him to get the hell out of his department with that AF of L button, or words to that effect. It is in the record.

Mr. Royster: There was testimony by Mr. Periera too as to——

Mr. Hecht: That was Periera, I think. I was mistaken [656] about Hellbaum.

Trial Examiner Ruckel: I don't quite see the force of it anyway. As far as getting out of the department, that clearly was his prerogative as a foreman, if he was a foreman.

Mr. Royster: Of course.

Trial Examiner: Irrespective of whether he was a member of the union.

Mr. Royster: No, but Mr. Hellbaum testified, if I recall it correctly (and, of course, the record will show whether I am correct or not) that he accused Mr. Grube of telling employees working under Mr. Grube that they must take off their AF of L buttons or go home. The testimony of Mr. Hellbaum was that Mr. Grube admitted that statement. Now, the question becomes pertinent, it seems to me,

(Testimony of Charles Wood.)

and material as to Mr. Grube's authority, and one criterion with respect to his authority, I think, can be found by reference to whether or not he was in the bargaining unit.

Trial Examiner Ruckel: Well, if you argue that way then you would say that he had little or no authority because he was in the bargaining unit.

Mr. Royster: Well, I say that he was not—I am asking this witness.

Mr. Edises: I submit, Mr. Examiner, that——

Trial Examiner Ruckel: Well, let's find out, if it is [657] important, if he is a foreman or if he isn't a foreman, irrespective of whether he is in the unit or not.

Mr. Hecht: It is stipulated he is a foreman.

Mr. Edises: He is a foreman in charge of a small department.

Trial Examiner Ruckel: Is it also stipulated, or is it a fact that he was in the union?

Mr. Edises: He was in the union, and, as the testimony of one of the Board's own witnesses indicated, he was one of the founders of the union at Peet's and very active as an officer and committee-man in the union until he was promoted not so very long ago.

Mr. Royster: That is correct.

Trial Examiner Ruckel: Now, as to whether he was in the unit or not, that doesn't have to be decided now, does it? I mean, is it important whether he was in the unit or not? If he was a supervisor, we have the essential facts to make a determination

(Testimony of Charles Wood.)

whether a statement that he makes amounts to interference, restraint, or coercion or not.

Mr. Royster: I would like to ask another question or two which I think will not be objectionable.

Q. (By Mr. Royster): You do have assistant foremen? A. We do.

Q. And you have a classification known as working foremen?

A. That is the mechanical gang only. [658]

Q. Has Mr. Grube a classification either of assistant foreman or working foreman?

A. Well, that has been a moot question, whether he was a working foreman or not.

Q. Well, how is he classified, or do you know?

Mr. Edises: Well, I suggest that—excuse the interruption, counsel. I should address this to the Examiner.

Mr. Examiner, I suggest that the witness be permitted to continue with his answer explaining what he means by his status as working foremen being a moot question.

Mr. Royster: Well, now, Mr. Examiner, perhaps this will serve to straighten it out—I am not trying to confuse this witness.

Q. (By Mr. Royster): Are foremen at the plant classified definitely as foremen, working foremen or assistant foremen?

A. Well, I wouldn't say absolutely definitely. There is more or less of a loose classification.

Q. Is there a payroll classification of those three?

(Testimony of Charles Wood.)

A. They are on the monthly payroll.

Q. All on the monthly payroll?

A. Yes, the whole group.

Q. Now, Mr. Wood, you testified that when Mr. Gleichman showed you a list, which you first identified you estimated held from 60 to 75 names, that you saw the names of some key men on there, and that disturbed you? [659] A. Yes.

Q. And that you later by counting the number of lines on the sheet of 18 by 13½ paper, I believe you said it was estimated the number of people who came on there. Now, on further direct examination by Mr. Edises that number, you quickly agreed, might have been 44?

A. Now, I told you that I had to look at the thing very quickly. I am refusing to take the sheet, but at the same time I was trying surreptitiously to see how many were on it, and I am not sure. When a paper is turned like that, and turned quickly, if you look at it, maybe those names didn't go down as far as my recollection went.

Q. Well, you got a good enough glance at that paper to pick out the names of some key men, did you not?

A. I think so, yes. There was some of the men I didn't want to have go.

Q. And on the basis of that glance or look, or quick scrutiny, you made a calculation, and your calculation was from 60 to 75 names?

A. Yes.

Q. Mr. Wood, do you consider that the ILWU

(Testimony of Charles Wood.)

broke its no-strike pledge to the Colgate-Palmolive-Peet Company, or to the President, rather?

Mr. Edises: Now, just a moment.

A. That is a question of law, I think. [660]

Mr. Edises: Just a moment. I was napping at the time that was asked. Would you mind reading that back to me?

(The question referred to was read by the reporter.)

Mr. Edises: Now, I will object to that.

Trial Examiner Ruckel: Objection sustained.

Mr. Royster: Well, for the purpose of the record I will state that I think the question is proper for the reason that the ILWU is in here with its head hung low, it has been disgraced by a strike which was held at the Colgate-Palmolive-Peet Plant, and I believe that this witness would, if permitted to answer, testify that it did not consider the strike pledge had been broken because it was not a strike of ILWU.

Trial Examiner Ruckel: Well, the witness might not be the arbiter of whether the situation was sufficient to warrant the CIO's head being held low.

Mr. Edises: I don't feel, Mr. Examiner, that I should let that pass, because although it may seem like a subject for levity to Mr. Royster, I can assure the Examiner that the ILWU is prouder of nothing in the world than the fact that its members had a 100 per cent record of adherence to that no-strike pledge during the war, and that this is the

(Testimony of Charles Wood.)

only black mark on the escutcheon of the ILWU. And I assure you it is a matter of great seriousness to us, and we don't like it being treated with the kind of levity that has been displayed. [661]

Mr. Rowell: What about a man coming around and asking for the discharge of 60 to 70 people in a war plant?

Mr. Edises: I don't care to engage in colloquy with you, Mr. Rowell.

Trial Examiner Ruckel: Are there any further questions?

Mr. Royster: Yes.

Q. (By Mr. Royster): Mr. Wood, you testified that for some considerable period prior to July 30 you had heard that the stewards at the plant had done certain things which had occasioned the displeasure of the ILWU. And you mentioned in that connection (if my memory serves me correctly), violation of the no-strike pledge.

Did you misspeak yourself there, or do you consider, or did you consider that the stewards had violated this no-strike pledge?

Mr. Edises: Now, just a moment. I am going to object to that question again on the ground that it is immaterial whether Mr. Wood considered that the stewards had violated the no-strike pledge, or whether he——

Trial Examiner Ruckel: I don't think it is material whether the company considered that the union had broken the pledge or not. It is a question of what the union considered.

(Testimony of Charles Wood.)

Mr. Edises: It is simply an indirect way of getting an answer to the same question that has just been objected to and [662] objection sustained.

Mr. Royster: No, it isn't, Mr. Edises. Mr. Wood testified, if my memory serves me, that he had heard some talk or rumors about the stewards violating the racial non-discrimination policy of the union, and in that connection that they had in some way violated the no-strike pledge.

Q. (By Mr. Royster): Now, is that correct, Mr. Wood? Was that your understanding?

Trial Examiner Ruckel: I think the witness testified that he read in the paper that these men had been accused of that, that is, by the union. The respondent was not accusing the men of breaking the no-strike pledge.

Mr. Royster: Well, that is not my recollection, Mr. Examiner. Of course, the record will show what was said.

I believe that is all.

Q. (By Mr. Rowell): Before these occurrences that began on July 28 and July 30, in connection with your job as labor relations supervisor, did you have occasion to learn among the employees any information as to either the union's charges against the employees or employees' charges against the union?

Mr. Edises: Objected to as too general and vague and speculative, impossible to determine what he is asking for from the question.

Trial Examiner Ruckel: Objection sustained.

(Testimony of Charles Wood.)

Q. (By Mr. Rowell): Well, now, your job, as you testify, was in connection with labor relations at the plant? A. Yes, sir.

Q. Did you have any occasion in connection with that job to find out how the labor relations were going?

Mr. Edises: Same objection.

A. I don't get that at all.

Trial Examiner Ruckel: Just a moment. Objection sustained.

Q. (By Mr. Rowell): Had there been an attempt during 1945, earlier in the year, to obtain a wage increase?

A. Well, I would have to ask you to qualify that more definitely. You mean a general increase or——

Q. (Interposing): I mean any increase?

A. There had been a request early in the year for an increase in wages for women and for second and third shift workers, and negotiations for that went over quite an extended period.

Q. Who made the request? A. The union.

Q. Was the wage increase granted?

A. Yes.

Q. In connection with those negotiations at that time did you have occasion to learn anything of the employees' attitude toward desiring wage increases?

Trial Examiner Ruckel: What is the purpose?

Mr. Rowell: I beg your pardon?

Trial Examiner Ruckel: I asked as to the materiality of the question.

Mr. Rowell: The materiality is just this: It

(Testimony of Charles Wood.)

seems to me that the evidence is clear in the case so far that the employees were dissatisfied with the union, as well as the union having been dissatisfied with the action of some of the employees.

Mr. Edises: Mr. Examiner, I will stipulate for counsel that the employees wanted wage increases, and that they wanted a number of other things, and that in all probability they wanted a number of things, including wage increases. I think that is a safe stipulation in almost any case involving labor relations.

Mr. Rowell: Well, I will accept the stipulation, but I would like to fill it out a little bit now by asking the witness some more questions.

Mr. Hecht: I think it is too remote, incompetent, irrelevant, and immaterial.

Trial Examiner Ruckel: What are you getting at? We are not going to try the merits——

Mr. Rowell: By no means. The crux of the case is that these employees became dissatisfied with the union and withdrew from it and joined another one.

Trial Examiner Ruckel: Well, apparently some of them did.

Mr. Rowell: That is quite true.

Trial Examiner Ruckel: I mean that is not in dispute, is it?

Mr. Rowell: By no means. I am going to find out what Mr. Wood knows about it.

Trial Examiner Ruckel: Well, ask him, I mean as to whether or not they were content with their

(Testimony of Charles Wood.)

wage status or something else now. If you want to explore his knowledge of this——

Mr. Rowell: Mr. Examiner, if you are going to restrict cross-examination so I have to just be satisfied with the answers that Mr. Wood gives his own counsel, I will just have to cease and desist.

Trial Examiner Ruckel: I am not going to restrict you, but go ahead, but don't ask him the merits of these wage controversies.

Mr. Rowell: Then I will stipulate that the purpose of the question is not on the basis of the merits of the wage controversy at all.

Trial Examiner Ruckel: If you ask the question, I will make the rulings. There is no question pending now.

Q. (By Mr. Rowell): Did you have an occasion to learn earlier in 1945, Mr. Wood, that the employees were making certain [666] demands that the union was not satisfying, in other words, demands of the company for wage increases, or on any other matter?

Mr. Edises: I will object to that on the ground that it would be comprehensible on its face. The union is not the one who is responsible for the wage increases, the company is the one who is responsible there, and during the war the government.

Trial Examiner Ruckel: Objection sustained.

Q. (By Mr. Rowell): Is it your practice to walk around through the plant?

A. Generally once a day I try to make the rounds.

(Testimony of Charles Wood.)

Q. In the course of that do you talk with employees in the plant? A. Occasionally.

Q. Do you talk with them about labor relations matters? A. Sometimes with the stewards.

Q. Did you talk with any of these five stewards in the early part of 1945 concerning labor relations matters?

A. Indeed I did. There was something going on all the time.

Q. Can you tell me what you mean by "something going on all the time?"

A. Well, they were always making requests for something, to have a girl transferred here, or a girl transferred there, [667] or this one was doing too much work, or——

Q. (Interposing): These five stewards were actively pursuing their jobs as stewards, so far as you know? A. I wouldn't put it that way.

Q. Well, what way would you put it?

A. Well, I thought they were trying to harass the company.

Q. Did they at any time during those discussions with you indicate dissatisfaction with the ILWU union? Was there any discussion of that kind?

A. Well, I won't say that they manifested dissatisfaction with the union, but they did make criticisms of the union officers.

Q. On how many occasions can you remember criticisms having been made of union officers?

A. That would be pretty hard to say; on numer-

(Testimony of Charles Wood.)

ous occasions, and several times in connection with certain matters.

Q. Yes. This was during the first half of 1945. I mean it was before these——

A. Well, I wouldn't say definitely whether it was just confined to the first half; for quite a number of months. I would say.

Q. Before July 30, let us say? A. Yes.

Q. Were such criticisms made during 1944?

A. To the best of my recollection I would say "Yes." [668]

Q. Did you have occasion to talk with employees other than the five shop stewards with regard to that matter?

A. About union matters, you mean?

Q. Yes.

A. You mean about union matters?

Q. Yes. A. No.

Q. Was it and is it your practice to observe the bulletin boards in the plant?

A. More or less, yes, incidentally, walking through.

Q. Did you also observe whatever union literature might have been being distributed about the plant? A. I was handed some.

Q. Were you handed any AF of L literature?

A. Yes.

Mr. Edises: Well, I submit that we ought to have the time fixed for a question of that sort.

Mr. Hecht: I assume he means the time of the campaign.

(Testimony of Charles Wood.)

Mr. Edises: I, frankly, can't see the relevance of all this line of testimony, but I have not objected heretofore because I was trusting that Mr. Rowell would not prolong it.

Mr. Rowell: It won't be long prolonged.

Q. (By Mr. Rowell): Can you fix the approximate time when you received any AF of L literature?

Trial Examiner Ruckel: The period? [669]

A. Well, it was during the time that these various bulletins were being distributed.

Trial Examiner Ruckel: That doesn't very accurately answer the question, does it? During what period?

Mr. Rowell: Suppose we place the time by reference to respondent's Exhibits 1 through 14?

Mr. Hecht: It is August 7 to October 15, Mr. Rowell.

Mr. Rowell: August 7 to October 15. That is the date of these various——

The Witness: What dates?

Mr. Hecht: August 17 to October 15.

The Witness: Yes, I would say that I undoubtedly was handed them at that time.

Q. (By Mr. Rowell): Do you know whether or not any of the persons that you have seen passing the AF of L buttons around in the plant——

Mr. Hecht: Now, just a moment. Mr. Wood did not say he saw anyone passing AF of L buttons around the plant.

Mr. Rowell: Well, I think he did.

(Testimony of Charles Wood.)

The Witness: I did not. I never said anything of the kind.

Mr. Rowell: Or wearing AF of L buttons.

Mr. Hecht: You saw them wearing AF of L buttons?

The Witness: I saw them wearing them.

Mr. Rowell: Well, that surprises me. [670]

Q. (By Mr. Rowell): I will ask you: You testified that there were some people in the plant still working there that you saw wearing AF of L buttons? A. Yes, sir.

Q. Do you know whether or not their names were on Mr. Gleichman's list before you had it cut down?

A. No, I do not.

Mr. Edises: Just a moment. I object to that. There is no testimony in the record that this witness had that list cut down.

Trial Examiner Ruckel: Objection sustained. The answer may be stricken.

Q. (By Mr. Rowell): By the way, when you were talking to Mr. Gleichman about the extensiveness of that first list that he was attempting to give you, you protested about the effect it would have on the company if you granted his request, did you?

A. I told him it was going too far, yes.

Q. That it would have an effect on the production?

A. I don't think I went that far. I didn't spend any more time with him than I could help. I wanted to get rid of it, and get at some of the officers of the union.

(Testimony of Charles Wood.)

Q. Did you tell him the company was engaged in war business and discharging so many people would hurt it? A. To whom? [671]

Q. Mr. Gleichman? A. No.

Q. To anyone else in the ILWU?

A. Yes.

Q. Who? A. Mr. Heide.

Q. What was his answer to that?

A. Well, I don't recall.

Mr. Rowell: I have nothing further.

Redirect Examination

By Mr. Edises:

Q. Mr. Wood, your company has received copies of these decisions of the trial committee testimony?

A. Yes, sir.

Q. I think you testified approximately the first part of November and the first part of January?

A. That is my best recollection.

Q. Is that right? A. Yes.

Q. This is the copy the company received, is it?

A. (Examining document.)

Q. And this is the other?

A. Well, it was those, or some like that.

Mr. Edises: All right. May I have these marked for identification, please?

The decision of Trial Committee dated October 10, 1945, [672] will you please mark that as Intervener's No. 6, and the decision of the Trial Com-

(Testimony of Charles Wood.)

mittee dated December 24, 1945, will you please mark that as Intervener's No. 7.

(Thereupon the documents above referred to were marked Intervener's Exhibits Nos. 6 and 7 for identification.)

Q. (By Mr. Edises): Now, the decision of October 10 refers to, among other things, to testimony showing that Haynes, Luchsinger, Marshall, Moreau and Smith had "been working against the established policies of the union for a long time. For example, the union's policies against discrimination on account of race or color."

Did you testify that you had some knowledge of such a beef? A. Yes.

Q. Prior to the time that you received this?

A. Yes, I did.

Q. This exhibit?

A. Yes, I have heard it.

Q. It further states: "Back in the early part of 1944 Marshall refused to take up the beef of a Negro member at Peet's named Harrison because he 'didn't like him,' the other stewards backed him up on this and all of them were taken before the grievance committee and found guilty of conduct unbecoming stewards and given a reprimand for their [673] treatment of this Negro brother."

Mr. Rowell: That is objected to, Mr. Examiner.

Trial Examiner Ruckel: Let counsel finish his question.

Q. (By Mr. Edises): My question is whether

(Testimony of Charles Wood.)

he had heard of that incident prior to the time when he saw this document?

Mr. Rowell: Don't answer, Mr. Wood. I want to make an objection, that the questions that I put were for the purpose of finding out whether there was any dissatisfaction of the stewards with the union, and the union with the stewards, and had nothing to do with——

Trial Examiner Ruckel: You put the question and he answered it.

Mr. Rowell: ——had nothing to do with this attempt to discipline stewards.

Trial Examiner Ruckel: No, this is something quite different. Are you objecting to it on the grounds of materiality?

Mr. Rowell: I object to it as immaterial, yes.

Trial Examiner Ruckel: Objection overruled.

Mr. Edises: All right.

Q. (By Mr. Edises): The question is: Did you have any knowledge of this incident before you saw this document? A. Oh, indeed, I did.

Q. The document goes on: "Then there was the Ulysses Norman case, where a union member at Peet's said out loud in [674] the dressing room that there are too many Negroes in the union, the quicker we get them out the better (only he didn't say 'Negro.')

Brother Norman, who is a Negro, filed charges against the brother who made this statement. Defendants Marshall and Sherman publicly defended the right of this member to make such attacks on Negro fellow members."

(Testimony of Charles Wood.)

Did you hear anything about that beef?

A. I heard about it.

Q. Prior to the time that you received this document?

A. Oh, way back sometime ago.

Q. At about the time it occurred, is that right?

A. Well, I wouldn't say that. I don't know when it occurred, but it was several months ago that I first heard it.

Q. Several months ago? A. Yes.

Q. Prior to your receiving this? A. Yes.

Mr. Rowell: Then I move to strike. The only materiality would be whether he heard of it before when the occurrence was allegedly occurring, before the action of the company.

Q. (By Mr. Edises): You knew about this before the stewards were dismissed, isn't that correct?

A. Yes.

Q. It further goes on to state: "There was a lot of evidence showing that all of the stewards fell way down on [675] the job when it came to carrying out the duties of their office. For instance, they refused to put Section 10 of the Peet's contract into effect, which called for setting up stewards for each department. They refused to select a chief steward as required by the contract."

Did you know anything about such a beef?

A. I knew that they refused to appoint a chief steward.

Q. Did you know that this was a subject of controversy within the union? A. Yes, I did.

(Testimony of Charles Wood.)

Q. It further states "They showed poor judgment in regard to what grievances to present to the management. They pushed many phony grievances."

Do you know that they had been charged with that by the union?

A. I did not know they had been charged with it, no.

Q. It states also: "They failed to attend meetings of the executive council, which was their duty as stewards, and also membership meetings."

Did you have any knowledge of that?

A. I had heard of that one.

Q. You had heard that had been the subject of controversy within the organization?

A. Well, I had heard they had been charged with it. I wouldn't say about "controversy." [676]

Q. This was prior to the time they were dismissed? A. Yes.

Q. Then it states further: "The union's political action program took a bad beating from the stewards. For instance, they refused to carry out the mandate of the union membership in regard to financial support for the National Citizens Political Action Committee. They sabotaged collection of funds for the defense of Harry Bridges of the ILWU. They opposed the program for wiping out the Little Steel formula. They bucked the union's program in regard to enforcing OPA regulations."

Now, had you heard of any such matters?

A. I had heard of some of them; some of them I hadn't.

(Testimony of Charles Wood.)

Q. You had heard that was a subject of controversy?

A. Some of them; not all of it I hadn't heard.

Trial Examiner Ruckel: Some of it?

The Witness: Yes.

Q. (By Mr. Edises): And it further states: "Toward the end of May, 1945, they even refused to call a meeting of the employees at Peet's to discuss current contract negotiations, air the grievances of the rank and file and elect stewards for the coming year. Brother Lou Gonick, business agent, demanded three separate times that they arrange to call such a meeting, but the stewards kept putting him off with phony excuses, and after they finally agreed to call a meeting they broke their promise, claimed they forgot all about calling the meeting."

Did you hear anything about that?

A. Give me that date again.

Mr. Royster: I will object now. I guess I must have been asleep for 30 minutes. This is direct examination, and if ever a witness was being led by the nose, why, this one is.

Mr. Edises: Mr. Examiner, I am simply asking him whether he had heard of these incidents referred to in the union's decision prior to the time that these persons were discharged. Now, I submit that it is not only relevant to the issues of this case——

Trial Examiner Ruckel: I don't see that it is leading. You may answer.

(Testimony of Charles Wood.)

Mr. Edises: How else can I ask if he knew about it.

Q. (By Mr. Edises): Now, that was, according to this, toward the end of May, 1945?

A. Would it be allowable for me to look at that? You have asked so many things there that I can't carry them all in my mind.

Q. Yes. This part here (indicating).

A. (Examining document) Yes.

Q. Now, the question is: Had you heard about the grievance, about the refusal of the stewards to call a meeting toward [678] the end of May, 1945?

A. I wouldn't place the date, but I had heard that there had been quite a little controversy about having a meeting.

Q. Well, it was your knowledge about the time that this event happened, whatever date it may have been?

A. Yes, I would say so.

Q. And this decision further states: "In regard to the second set of charges, against Lonnberg, Olsen, Thompson and Sherman, the evidence showed that these four men were responsible for pulling the only wartime strike that members of this local ever were guilty of."

Had you heard that these men had been charged with responsibility for pulling that strike?

A. Yes, yes.

Q. It further states: "On top of this, the evidence shows that three of these men, Sherman, Thompson and Lonnberg, made libelous and defamatory charges against Paul Heide and other

(Testimony of Charles Wood.)

officials of the union, such as being racketeers, looting the union's treasury, and so forth.'

Had you heard that such charges had been made against officers of the union?

A. Will you mention the names again that those charges specify?

Q. Against Paul Heide.

A. No. The men that the charges were made against. [679]

Q. "On top of this, the evidence shows that three of these men, Sherman, Thompson and Lonnberg, made libelous and defamatory charges against Paul Heide and other officials of the union, such as being racketeers, looting the union's treasury, and so forth?"

A. Not about those three, I had not heard it.

Q. You had not heard that about these three men? A. No, I did not, no.

Q. Had you heard that others of the persons involved in this case were accused of making such charges? A. Yes, I had heard that.

Mr. Edises: I think that is all. I think he testified that he knew about the charges in regard to the wartime strike, which was the charge——

Trial Examiner Ruckel: (Interposing) Are we on the record now, or off?

Mr. Edises: I really shouldn't be.

Trial Examiner Ruckel: Off the record.

(Remarks outside the record.)

Trial Examiner Ruckel: On the record.

Mr. Edises: Mr. Examiner, I will offer in evi-

(Testimony of Charles Wood.)

dence as Intervener's 6 the decision of trial committee of the union, and as Intervener's No. 7—No. 6 is the decision dated October 10, 1945, and No. 7 the decision of the trial committee dated December 24, 1945. [680]

I will stipulate that I do not make the offers for the purpose of establishing thereby the truth of the matters contained in the decisions, but simply as the decisions rendered by the trial committee of the union in the cases involving the individuals named therein.

Mr. Royster: I would like to take a look at those.

(Examining documents) On No. 7, is it true, Mr. Edises, that all of these individuals were found—all but two were found guilty of violating the no-strike pledge, and that two were found guilty of permitting and encouraging an unauthorized strike in wartime?

Mr. Edises: That is my recollection, but the decision, of course, would show that itself.

Mr. Royster: Yes. And this exhibit is offered, if I understand it correctly, solely for the purpose of showing that such a finding was made?

Mr. Edises: Yes, a finding was made.

Mr. Royster: I have no objection to 7.

Trial Examiner Ruckel: Does anybody else have an objection to 7?

Trial Examiner Ruckel: Does anybody else have an objection to Intervener's 7?

(Testimony of Charles Wood.)

Mr. Hecht: I have no objection.

Trial Examiner Ruckel: It will be received.

(The document heretofore marked [681] as Intervener's Exhibit No. 7 for identification was received in evidence.)

Mr. Edises: I am sorry. Have both the exhibits been received?

Trial Examiner Ruckel: 7 has.

Mr. Royster: I have no objection to Intervener's 6 either. I assume that it is also offered only for the purpose of showing that the individuals named here were found guilty of certain charges?

Mr. Edises: That is right.

Trial Examiner Ruckel: Any other objection?

Mr. Hecht: I have none.

Mr. Rowell: No objection.

Trial Examiner Ruckel: It will be received.

(The document heretofore marked Intervener's Exhibit No. 6 for identification was received in evidence.)

Trial Examiner Ruckel: Any further questions of this witness?

Mr. Edises: No further questions.

Recross Examination

By Mr. Royster:

Q. When was it, Mr. Wood, that you learned that the four committeemen, as we have referred to

(Testimony of Charles Wood.)

them here, were charged with fomenting and encouraging a wartime strike?

A. Well, I never had, if I recall, precise—I don't have [682] precise knowledge of the time I heard it. Lots of this stuff came to me as the thing progressed, after the 1st of August.

Q. Well, it would be true, would it not, to say that you heard of no charges until after these men had been discharged? A. Now, let me think.

Mr. Edises: I would like to here, for a moment,—

Mr. Royster: I would like to have the witness answer it.

Mr. Edises: Well, I would like to object then on the ground that the question is not made clear, whether he is referring to the filing of a formal charge under the union's trial machinery, or whether he is simply referring to a general accusation that these guys were responsible for pulling that phony strike.

Mr. Royster: Well, I am talking to the witness in the same terms that you talked to him. You read certain allegations that had been made concerning these committeemen to the witness, and you asked him if he had ever had knowledge that such charges were a matter of controversy within the union, and he answered "Yes". Now, I am trying to show, or trying to discover when he learned of this controversy or discussion.

Trial Examiner Ruckel: Well, it is very appar-

(Testimony of Charles Wood.)

ent that this trial did not take place until long after they were suspended. [683]

Mr. Royster: Yes, Mr. Examiner, but the trial relates matters which happened long before the strike took place, and the witness said "Yes", he knew that these matters were a subject of controversy.

The Witness: I said I heard it.

Q. (By Mr. Royster): Yes, you heard it.

A. I didn't say I knew it.

Q. But you heard there was certain controversy within the union? A. Yes.

Q. And that it concerned the matters about which Mr. Edises read to you?

A. Yes, but I was not a member of the union. I didn't know——

Mr. Hecht: Mr. Wood, I think that Mr. Royster has in mind whether you heard that these men were accused of pulling the strike after it occurred, or after the strike occurred.

Mr. Rowell: When?

Mr. Edises: No, I don't think——

Mr. Rowell: That doesn't make sense.

Trial Examiner Ruckel: I don't think that is the question.

Mr. Royster: Well, I will ask this question:

Q. (By Mr. Royster): Did the fact that you at some time heard that these four committeemen had been charged with [684] responsibility for fomenting or leading a wartime strike have any-

(Testimony of Charles Wood.)

thing to do with your accession to the union's demand that they be suspended?

Mr. Hecht: I object.

A. Name the four men.

Mr. Edises: Just a minute. I object.

Mr. Hecht: I object to the question. It has nothing to do with this case, and whether he acceded to it because they had been charged with a strike, or whether he acceded to it because a letter was presented to him, there is no point in asking him that question.

Mr. Edises: I would like to add on the ground of complicity with what counsel says the evidence shows very clearly and it has not been contradicted, that the basis for the company's acquiescence in the union's demand was their belief, good faith belief, that the contract required them to do so and, that, as a matter of fact, they acted contrary to their own desires in doing so.

Mr. Rowell: Well, now, counsel has so well educated the witness I suggest you withdraw the question, Mr. Royster.

Mr. Royster: Well, of course, the record and the evidence is not as clear as Mr. Edises would have us believe, and the fact is that there has been some effort here by way of testimony to establish that the witness and other responsible officers of the company could well believe that the ILWU's request that these men be suspended was based upon certain [685] actions that the individuals had taken, which was distasteful to the ILWU, and had no

(Testimony of Charles Wood.)

bearing upon this A F of L controversy in the plant.

Mr. Hecht: May I make a statement at this point, Mr. Royster? I believe the question of law involved here is the knowledge of the company with reference to the reasons why these men were put in bad standing. Your question was the reason why the company acceded, and I think the record is clear as to why the company acceded, because it was told that the men were not in good standing. So, perhaps if you would reframe your question I would have no objection.

Mr. Royster: Well, of course, that is your conclusion, Mr. Hecht.

Mr. Hecht: Well, that is the basis of my objection.

Mr. Royster: I will withdraw the question and I have no further questions of this witness.

Q. (By Mr. Rowell): Could I ask who you heard these various matters from, Mr. Wood?

A. Well, I would have to ask you to be more specific? What various matters?

Q. For example, from whom did you hear that these stewards had been spreading false and misleading information among the membership concerning the policy and program of the union, the activities and position of union officers, the status of the union treasury, and the status [686] of the contract between the union and Colgate-Palmolive-Peet Company?

Mr. Edises: Objected to on the ground that he

(Testimony of Charles Wood.)

did not testify having such knowledge. That question was not asked of him.

Q. (By Mr. Rowell): From whom did you hear that Sherman—I withdraw that.

From whom did you hear that two of the shop stewards had been charged with making statements against Paul Heide and other officials of the union, such as that they were looting the union's treasury and so forth?

A. Can you name the stewards?

Q. Well, it says here, "Sherman, Thompson and Lonnberg," but I think you testified it was Marshall and——

Mr. Hecht: No. He didn't testify it was Marshall.

A. I didn't testify.

Q. (By Mr. Rowell): Did you testify you had heard some charges made against stewards of that kind?

Trial Examiner Ruckel: He particularly specified he didn't hear it as to these.

Q. (By Mr. Rowell): Did you testify that you had heard these shop stewards had been charged with refusing to call a meeting of the employees?

A. Yes, I had heard they refused to call a meeting.

Q. Who did you hear that from? [687]

A. I can't recall. It was common talk around the plant, there was quite a bit of talk about it, that they hadn't had a house meeting for a long time.

Q. Was there talk pro and con about that?

(Testimony of Charles Wood.)

Mr. Edises: Well, now, I will object to that. It is going outside the scope of proper cross examination. What possible difference could it make?

Trial Examiner Ruckel: Objection sustained.

Mr. Rowell: Well, now, Mr. Examiner, if evidence is brought in here that there was dissatisfaction on the part of the union with the conduct of these employees I am certainly entitled to bring out that the company had knowledge that the employees were dissatisfied with the union.

Trial Examiner Ruckel: Yes, but the employees are not charged with discharging the union. The union is, or the respondent is accused of discharging the employees at the invitation of the union.

Mr. Rowell: Certainly.

Trial Examiner Ruckel: So the question is, what did the respondent hear that might be the union's reasons for asking the discharge of these men. It is not relevant to what might have been on the other side.

Mr. Rowell: It certainly is. If the Respondent knew that the employees were dissatisfied with this union and were trying to get out of it, then they are certainly put on [688] notice as to—at least, it certainly is evidence that they knew why the union was taking that action.

Trial Examiner Ruckel: Well. Respondent has already testified that it is perfectly clear that their employees were trying to get out of the union. That is not controverted.

(Testimony of Charles Wood.)

Mr. Rowell: And that the company knew about it. All right, I withdraw it.

Mr. Edises: Those were your words, Mr. Rowell.

Mr. Rowell: The Examiner wouldn't let me add to the proof on the score.

Trial Examiner Ruckel: Any further questions of this witness?

Mr. Royster: Nothing further from the Board.

Mr. Hecht: Nothing further.

Mr. Edises: No further questions.

Mr. Hecht: And the respondent rests, Mr. Examiner.

Trial Examiner Ruckel: That is all.

(Witness excused.)

Does the Board or the intervening union have any witnesses?

Mr. Edises: Could we go off the record for a minute?

Trial Examiner Ruckel: Off the record.

(Remarks outside the record.)

Trial Examiner Ruckel: On the record. [689]

Mr. Edises: Will you please mark this as Intervener's Exhibit 8 and Intervener's 9?

(Thereupon the documents above referred to were marked Intervener's Exhibits 8 and 9 for identification.)

Mr. Edises: Will it be stipulated that the two transcripts of testimony which I hold in my hand, and which are marked for identification as Inter-

vener's Exhibit 8 and Intervener's Exhibit 9, being the transcripts of the testimony taken at the trials of various of the complainants on which the decisions heretofore introduced in evidence as Intervener's 6 and 7 were based, may be received in evidence for the sole purpose of indicating the proceedings on which those decisions were based and not as evidence of the truth of any of the matters contained in those transcripts?

Mr. Royster: So stipulated.

Mr. Rowell: So stipulated.

Mr. Hecht: No objection.

Trial Examiner Ruckel: They may be received.

(The documents heretofore marked Intervener's Exhibits Nos. 8 and 9 for identification were received in evidence.)

Mr. Edises: Mr. Examiner, could I ask that we have a few minutes' recess for the purpose of checking my notes to determine whether I have anything further?

Trial Examiner Ruckel: We will recess for five minutes. [690]

(A short recess was taken.)

Trial Examiner Ruckel: On the record.

Has the Intervener finished?

Mr. Edises: Yes, the Intervener will not produce any further evidence.

I would like to ask the Examiner whether, in his opinion, the filing of a written motion to intervene is required, because on account of the pressure of

other business I was unable today to go down to my office and pick up the written motion which I had dictated over the telephone. If, in the opinion of the Trial Examiner, it is not mandatory, I would prefer to rest on our oral intervention.

Trial Examiner Ruckel: It is not mandatory. I will waive the requirement of a written petition and grant your oral petition as of yesterday, or as of the first day of the hearing, to intervene.

Mr. Edises: Thank you.

Trial Examiner Ruckel: Are there any motions by any of the parties?

Mr. Royster: I move, Mr. Examiner, to conform the pleadings to the proof in matters such as the dates, spelling of names, and other matters not of substance.

Trial Examiner Ruckel: If there is no objection, the motion will be allowed.

Mr. Hecht: No objection whatsoever, Mr. Examiner. [691]

Mr. Royster: I have no further motions.

Mr. Hecht: At this time, Mr. Examiner, I would like to move to dismiss the charge contained in Paragraph V of the complaint, Subdivision 3, to-wit: "Refusing union representatives access to its Berkeley plant, while permitting ILWU representatives freely to enter the plant——."

Trial Examiner Ruckel: I don't think the reporter can hear you.

Could it be comprised by saying that you renew all the motions made this morning which were not granted by the Trial Examiner?

Mr. Hecht: Yes, Mr. Examiner.

Trial Examiner Ruckel: Ruling on those motions is reserved.

Mr. Edises: For the ILWU I would likewise renew the motion to dismiss on the ground that the actions taken in regard to the complainants was pursuant to a valid closed shop agreement, and, further, that in any event the complainants should be denied any relief under the Act because of their participation in an illegal wartime strike.

Trial Examiner Ruckel: Ruling is also reserved on that motion.

Mr. Hecht: Mr. Examiner, at this time on behalf of the respondent I would like to have all charges brought on behalf [692] of Edward Navarro dismissed.

The Examiner will recall that Mr. Navarro was a member of the CIO No. 1304, Machinists, and actually never maintained, or never had an ILWU status at the plant.

Trial Examiner Ruckel: Wasn't there some further—what do you claim for Navarro?

Mr. Royster. Well, Mr. Examiner, I claim that it was not the practice at the Colgate-Palmolive-Peet Plant to enforce the closed shop contract as far as members of the Eastbay Union of Machinists, Local 1304, is concerned, that others at the plant had membership only in the Machinists Union and were not disturbed in their employment, and it was not until Mr. Navarro wore an A F of L button and otherwise indicated his friendliness toward the A F of L, that he was discharged.

Mr. Edises: Mr. Examiner, may I be heard a moment on that? I have no recollection that the testimony shows any of the matters referred to by Mr. Royster. I am quite certain that those matters were not gone into at all in the record. The fact is I am informed by Mr. Gleichman that the only exceptions made in the case of 1304 people were those who worked as machinists. And I will further remind the Examiner of the testimony that Mr. Luchsinger, one of the complainants here, asked this man to join the ILWU.

Trial Examiner Ruckel: That is my recollection, but I [693] am not going to grant the motion now. The record will bear reading. Ruling is reserved.

Mr. Hecht: Mr. Examiner, at this point I also would like to move to dismiss all charges brought on behalf of the following named complainants: Calixto Rigo, Robert Ashworth, Thomas Azevedo, Manuel Munoz, Nick Tate, Glenn Hixson, Vincent Barboni, Martin Heppler, Alden Lee, Felix Denkowski, Manuel Souza, Albert Zulaica, Ann Cerrato, Ina Mae Paige, Catano Periera, Rose Ros and John Puruca.

The basis of the motion, Mr. Examiner, is the basis of my motion directed to Albert Zulaica, for the reason that these persons who are now complainants here pleaded guilty to charges brought against them by the ILWU, and it is hardly fitting that persons who have admitted that they were put in bad standing for reasons other than membership of the A F of L should be in this Board, before this

Board claiming relief on the basis that they were discharged for A F of L activity.

Trial Examiner Ruckel: Ruling on the motion is reserved.

Mr. Royster: I would just like to remark that, of course, the individuals named did not in any way admit that the reason for their suspension from membership was their participation in this strike.

Mr. Hecht: I think that the record and the findings would bear the contrary out, Mr. Royster, and I am not saying [694] they were guilty of the charge, but I am saying that they did admit the charge.

Trial Examiner Ruckel: Any further motions?

Mr. Hecht: I will move, without stating the grounds (I think I have already expressed them to the Examiner) to dismiss the whole proceeding on the basis that this is an attack on the validity of a contract that has not otherwise been in any way impeached as fraudulent, invalid, or an imposition on the desires of the complainants before this Examiner.

Trial Examiner Ruckel: Ruling is reserved.

Mr. Hecht: No further motions.

BOARD'S EXHIBIT N. 3

[Warehouse Union Local 6 Letterhead]

July 30, 1945.

Colgate, Palmolive, Peet Company,
6th & Carlton Streets,
Berkeley, California.

Att: Mr. C. A. Altman

Dear Mr. Altman:—

This is to notify you that charges have been preferred by this Union against the following employees of your Company, and that they have been suspended from membership of this organization pending a trial as provided for in the Constitution of our local Union:

Clyde W. Haynes, R.F.D. #2, Box 884, Walnut Creek, Calif.

Dave Luchsinger, 434 - 65th Street, Oakland.

Frank Marshall, Rt. 1, Box 241, Walnut Creek, Calif.

Sanford Moreau, 1004 Jones Street, Berkeley, Calif.

Harry A. Smith, Box 243, Rt. 6, Walnut Creek, Calif.

We therefore, respectfully request that the above-named employees of your Company be immediately removed from the job until such time as the charges against them have been determined by this organization.

Trusting that we may have your cooperation in this matter, we remain

Very truly yours,

/s/ PAUL HEIDE,

PH:ES

Vice-President

owu-cio

BOARD'S EXHIBIT No. 4

This phamphlet was distributed on Co. property before discharge of first 5 employees (Steward) distributed July 30, 1945.

Attention!

All Warehouse Union Members:

An illegal meeting has been called by certain employees of Peet's, now under suspension as members of this union for violation of the membership oath, and other illegal acts.

Warning!

Any member of Local 6 who attends such illegal meeting or participates in violations of our constitution, does so at the risk of losing membership and employment.

GENERAL EXECUTIVE BOARD

Warehouse Union Local #6, ILWU

owu/cio

BOARD'S EXHIBIT No. 5

[Standard Form No. 14 Telegram]

July 30, 1945.

Int. Warehouse Union 6

You are hereby notified that more than 200 employees of the Colgate-Palmolive-Peet Co., all being former members of your union and being more than 50% of such employees by action taken for such purpose have and do hereby withdraw from your union, sever connections and refuse to be further bound by any of the laws rules or regulations of the constitution of I.L.W.U.

EMPLOYEES WELFARE ASSOCIATION

By Negotiating Committee

E. H. Thompson

W. Sherman

BOARD'S EXHIBIT No. 6

[Western Union Telegraph Form)

WUAH 17 61 Berkeley Calif July 30 1048A

Bert Railey, Mgr

Colgate Palmolive Peet Co.

800 Carleton St WUX Berkeley Calif.

You are hereby notified of action taken by more than 200 employees of Colgate Palmolive Peet Co all being former members of RLWU 1-6 and being more than 50 percent of total employees have with-

drawn and severed relations with ILWT-6 as collective bargaining agent.

EMPLOYEES WELFARE ASSOCIATION

By Negotiating Committee 921A

E H Thompson William Sherman

H Lunnberg L Olson

BOARD'S EXHIBIT No. 7

Colgate-Palmolive-Peet Co.

Agreement

This Agreement, made and entered into this 9th day of July 1941, by and between Colgate-Palmolive-Peet Company, Berkeley, Plant hereinafter referred to as the Employer, and Warehouse Union Local 1-6, I.L.W.U., hereinafter referred to as the Union.

Witnesseth

* * * * * * *

Section 2. Recognition. The Union is hereby recognized as the sole collective bargaining representative for all employees covered by this agreement.

Section 3. The Employer agrees that when new employees are to be hired to do any work covered by Section One (1), they shall be hired thru the offices of the Union, provided that the Union shall be able to furnish competent workers for work required. In the event the union is unable to furnish competent workers, the Employer may hire from

outside sources, provided that employees so hired shall make application for membership in the Union within fifteen (15) days of their employment. The employees covered by this agreement shall be members in good standing of the Union and the Employer shall employ no workers other than members of the Union subject to conditions herein above prescribed. In the hiring of new help (for the warehouses), they shall be hired through the offices of the Warehouse Union, Local 1-6, I.L.W.U.

* * * * *

Section 18. Future Changes. The above constitutes an agreement between the Company and its employees, represented by the International Longshoremen's and Warehousemen's Union, Local 1-6, and shall remain in effect unless and until changes become necessary because of conditions beyond the control of the Company or are requested by the employees through their representatives.

Thirty (30) days notice will be required before the adoption of any change suggested by either the employees or the Company and no change of any sort will be made without collective agreement to it having been arrived at between the Company and the representatives of the employees. If and when such changes are found necessary they will be made with due regard for the mutual rights, privileges and well being of the employees and the Company.

Memorandum of Agreement

It is hereby agreed that certain contract dated July 9, 1941, by and between Warehouse Union,

Local 6, I.L.W.U., and Colgate, Palmolive Peet Company, shall remain in full force and effect, pending the disposition of those provisions which apply to the following:

Shift differentials

Wage rates for women workers

Sick leave

and upon which agreement has been reached by the parties hereto, subject to approval of the Tenth Regional War Labor Board.

BOARD'S EXHIBIT No. 8

Attention All Members I.L.W.U. #6 Employed at
Colgate, Palmolive, Peet Company!
Look Before You Leap!

Because of a constant campaign of misinformation and falsehoods carried on by Sherman-Marshall-Lundeburg & Co., many otherwise reliable members of our union are being misled down a blind alley, and into action that can only result in losses and hardship for the membership involved. The unscrupulous people who are attempting to promote strike action at this plant are traitors to our union membership, our flag and our country! All members who join with them are jeopardizing their own reputation, their union standing, their seniority and their jobs! Any strike at this plant will bring an immediate directive from the Regional War Labor

Board to return to work—and will resolve no issues—fancied or otherwise!

So that all members may understand the true situation, the following is a copy of agreement extending the provisions of the union contract, including the requirement that only members of Warehouse Union, Local #6, I.L.W.U., in good standing may be employed by the company. It will be enforced by the entire membership of our union, if it becomes necessary.

Memorandum of Agreement
(Copy)

It is hereby agreed that certain contract dated July 9, 1941, by and between Warehouse Union, Local 6, I.L.W.U., and Colgate, Palmolive, Peet Company, shall remain in full force and effect, pending the disposition of those provisions which apply to the following:

Shift differentials

Wage rates for women workers

Sick Leave

and upon which agreement has been reached by the parties hereto, subject to approval of the 10th Regional War Labor Board.

In Witness Whereof, we set our hands and seals this 24th day of July, 1945.

COLGATE, PALMOLIVE, PEET COMPANY

By /s/ C. A. ALTMAN

WAREHOUSE UNION, LOCAL 6, ILWU

By /s/ LOUIS GONICK

BOARD'S EXHIBIT No. 9

(Copy)

Warehouse Union, Local 6, C.I.O.

158 Grand Avenue Oakland 12, Calif. Higate 5045

July 31, 1945

Mr. Lincoln Olsen
623 Kearney St.,
El Cerrito, Calif.

In accordance with Article 15, Sections 1, 2 & 3, and in accordance with Section 7 of the same Article, of the Constitution of Warehouse Union, Local 6, International Longshoremen's & Warehousemen's Union, you are hereby notified that charges are preferred against you for the following violations of the constitution and By-Laws of this organization:

1. Violation of Declaration of Principles.
2. Violation of Oath of Membership.
3. Violation of Article 9, Section 1.

You are hereby notified that in accordance with Section 14, of Article 15, the Executive Committee finds that there is good cause to believe the charges to be true, and you are, therefore, suspended as a member of this Local as of this date, losing all rights and privileges, pending a trial as provided for in Article 15 of the Constitution of Warehouse Union, Local 6, ILWU.

/s/ PAUL HEIDE,

PH:ES

owu-cio

Vice-President for the Gen-
eral Executive Board

Registered—Return Receipt Requested

Received Aug. 31, 1945.

BOARD'S EXHIBIT No. 10

[Warehouse Union, Local 6 Letterhead]

September 1, 1945.

Colgate-Palmolive-Peet Company,
6th & Carlton Streets,
Berkeley, California.

Att: Mr. C. A. Altman

Dear Mr. Altman:—

This is to notify you that the employees named below have been suspended from membership in this Union and are no longer members in good standing.

Pending the determination of Charges which have been filed against these persons in accordance with our Constitution and By-Laws, you are requested, in accordance with our Agreement, to remove these persons from your employ until such time as you receive word from us in regard to their status as members in this Union.

Rose Ross

Esther Young

Ina M. Paige

Ophelia Reyes

Kay Norris

Ann Cerrato

Henry Giannarelli

Manuel Souza

Albert Zulaica

Martin Heppler

Bill Howard

Glex Hixon

Alden Lee

Al Barboni

Felix Denkowski

A. L. Richards

Terry Anderson

K. Periera

Mike Ramirez

Your immediate attention to this request will be appreciated.

Yours very truly,

/s/ PAUL HEIDE,

PH:ES

Vice-President.

own-cio

Received Sept. 11, 1945.

BOARD'S EXHIBIT No. 11

[Warehouse Union, Local 6 Letterhead]

July 30, 1945.

Mr. William Sherman,
1515 Kains Avenue,
Berkeley, California.

In accordance with Article 15, Sections 1, 2 & 3, and in accordance with Section 7 of the same Article, of the Constitution of Warehouse Union, Local 6, International Longshoremen's & Warehousemen's Union, you are hereby notified that charges are preferred against you for the following violations of the constitution and By-Laws of this organization:

1. Violation of Declaration of Principles.
2. Violation of Oath of membership.
3. Violation of Article 9, Section 1.

You are hereby notified that in accordance with Section 14, of Article 15, the Executive Committee finds that there is good cause to believe the charges to be true, and you are, therefore, suspended as a

member of this Local as of this date, losing all rights and privileges, pending a trial as provided for in Article 15 of the Constitution of Warehouse Union, Local 6, I.L.W.U.

/s/ PAUL HEIDE,

Vice-President for the Gen-
eral Executive Board

PH:ES

owu-cio

Registered—Return Receipt Requested

BOARD'S EXHIBIT No. 12

August 22, 1945.

Dear Member:

Further investigation of the disruptive activities of former Shop Stewards and others, brings to light the following facts:

1. Some people enjoyed benefits of the closed shop Agreement at Peets, who were not members of your Union. Although the majority were paying their initiation, dues, and going to the meetings, there were a chosen few who were riding free. Why?
2. Many "favorites" were being "excused" from meetings, saving a \$1.00 fine, and undermining interest in Union affairs. Why?
3. Management was not reporting all new people hired, so that between the Stewards and the Company, your Union was steadily undermined

for six months. Those who did the dirty work were the ones pointing fingers at the elected Union officials and committing slander, while at the same time making big promises about the A.F.L. Why?

4. We found that these "misleaders" advised:
 - a) That the CIO Warehouse Union, Local 6, had no Agreement with Peets.
 - b) Not to join the CIO Warehouse Union.
 - c) Not to pay dues.
 - d) Not to show your Union book to any CIO Steward or official.
 - e) That you didn't have to bother with rules and by-laws passed by majority of the 18,000 members of Local 6.
 - f) That you didn't have to listen or follow the instructions of Bopp, Squires, Leacock and DaCruz, the Stewards who were elected unanimously at the last Peet's house meeting held Friday, August 10th, 8:00 P.M.

You Have Been Fed Poison and Now You Are
Being Wrongly Advised. Why?

5. Warehouse Union, Local 6, has an agreement with Peet's. A large company such as Peet's would not do business with a Union if it didn't have a written contract. Chemical Workers' Union #233 would be hard pressed to prove there wasn't a contract. They know a "good standing clause" is why the Company had to lay off the nine men when Local 6 demanded it.

6. Only members of the Warehouse Union, Local 6, work at Colgate Palmolive Peet Company. If anyone says different—let him test it!
7. Any Peet's employee reported as trying to get people to bolt the CIO and join the AFL or wearing an AFL button, will be taken off the job.
8. Local 6 is defending your best interest when it acts against disruptive members, just as in the Armed Forces we are always better off when spies and fifth columnists are kicked out, rather than appeased.
9. The coming trials will determine the honesty and justness of the charges.
10. As a result of the investigation last week, we have found it necessary to consider the removal of several more of the ringleaders who have violated all of our rules.
11. In a few days there will be a dues book check-up at the plant. Anyone who does not have his book will have to go home and get it.

If . . .

- a) you are more than sixty days delinquent in dues, you may be suspended from the job.
- b) You are six months delinquent, you will automatically be dropped from the rolls as a member in bad standing.

Who Got You Into This Mess?

Devotion to a friend, the noblest of human instincts, has been misused, and you have been misled. Regardless of whether there is an NLRB election, you will find that your confidence has been misplaced in a small group of selfish individuals at Peet's who would rather be "big fishes" in a small pond than just "average size" in a big pond. Ambitious, self-seeking men, are often willing to do anything to get one step higher . . . even tho they may injure the welfare and pocket books of their friends and fellow workers.

Some "innocent" bystanders and "standbyers" will lose their AFL initiation fee and dues, while this provoked argument awaits settlement. When you consider the big fight ahead to improve our present wages, isn't it criminal that you should be used by unscrupulous people at the cost of your retroactive pay, pensions and seniority?

The Loss in the pocket will be yours, not the weak new Chemical Workers' Union.

Certain restrictions have been lifted from the War Labor Board procedure. Your Union demands the Company immediately institute:

- a) 5c per hour additional for women.
- b) 5c per hour additional for swing workers.
- c) 10c per hour additional for graveyard workers.
- d) 5 days' sick leave.

The Next Step—Sufficient wages per hour so that if the 40-hour week returns, you will not suffer take-home pay reduction.

Last Monday's special membership meeting attended by 2,000 members, and yesterday morning's membership meeting for graveyard workers, attended by 300 people, passed the following resolutions unanimously:

- 1) That CIO Warehouse Union, Local 6, participate, with the rest of the CIO Unions in this area, in a Wage Conference to establish the following benefits for all of our members.
 - a) \$1.15 per hour base pay for all warehouse workers.
 - b) Elimination of sex differential, once and for all, so that women get the same pay as men.
 - c) Jobs for all, regardless of race, color, sex or creed, and especially for returning veterans, to get all the benefits that they would have enjoyed had they not fought.

We Suggest—If you value your future at Colgate Palmolive Peet; if you enjoy your present job; if you would like to retain your seniority and pension, and receive the retroactive pay due you, we advise you to think carefully about anything told you—then tell the AFL disrupters that you are not interested in their form of phoney unionism.

WAREHOUSE UNION,
Local 6, I.L.W.U.

owu:cio

Received Aug. 31, 1945.

BOARD'S EXHIBIT No. 14

United States of America
Before the National Labor Relations Board

Case No. 20-R-1486

In the Matter of
COLGATE-PALMOLIVE-PEET COMPANY
and
INTERNATIONAL CHEMICAL WORKERS
UNION, AFL

Mr. Bartley C. Crum, of San Francisco, Calif.,
for the Company.

Mr. Harvey E. Howard, of Oakland, Calif., and
Mr. O. L. Farr, of Selma, Calif., for the AFL.

Messrs. Paul Heide and Charles Duarte, and
Gladstein, Grossman, Sawyer & Edises, by Mr.
Bertram Edises, of Oakland, Calif., for the CIO.

Mr. Benj. E. Cook, of counsel to the Board.

DECISION AND DIRECTION OF ELECTION
Statement of the Case

Upon a petition duly filed by International Chemical Workers Union, AFL, herein called the AFL, alleging that a question affecting commerce had arisen concerning the representation of employees of Colgate-Palmolive-Peet Company, Berkeley, California, herein called the Company, the National Labor Relations Board provided for an appropri-

ate hearing upon due notice before Robert E. Tillman, Trial Examiner. Said hearing was held at San Francisco, California, on August 22, 1945. At the commencement of the hearing, the Trial Examiner granted a motion to intervene by International Longshoremen's and Warehousemen's Local 6, CIO, herein called the CIO. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

At the hearing, the Trial Examiner reserved ruling for the Board on motions made by the Company and the CIO to postpone any election to be directed herein until such time as the Board determines the validity of the charges filed by the AFL in case No. 20-C-1372. The motions are hereby denied.¹ The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded an opportunity to file briefs with the Board.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Company

Colgate-Palmolive-Peet Company is a Delaware corporation, having its central office in Jersey City, New Jersey. It operates plants in Jersey City, New

¹The AFL on August 13, 1945, waived its right to protest any election directed herein on the grounds set forth in the charges filed by it in Case No. 20-C-1372.

Jersey, Brooklyn, New York, (a subsidiary), Jeffersonville, Indiana; Kansas City, Kansas, and Berkeley, California, where it is engaged in the manufacture and sale of soap and glycerine. During 1944, the gross sales of the Company at its Berkeley plant, the only plant involved in this proceeding, were in excess of \$1,000,000, and the total sales to customers located outside the State of California amounted to more than 25 per cent of the gross sales. During the same period, raw materials having a value in excess of \$1,000,000, were used at the Berkeley plant, of which more than 25 per cent was obtained from points outside the State of California.

The Company admits and we find that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. The Organizations Involved

International Chemical Workers Union, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

International Longshoremen's and Warehousemen's Local 6, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Company.

III. The Question Concerning Representation

The Company has refused to recognize the AFL as the exclusive bargaining representative of its employees.

It is the contention of the Company and the CIO that a contract executed by them July 9, 1941, together with successive extensions, constitutes a bar

to this proceeding. Neither the original nor supplemental contracts contain a definite termination date.² In view of its indefinite duration and the fact that it has been in force for at least 1 year, we find that the contract and extensions thereof, do not constitute a bar to a determination of representatives.

A statement of a Board agent, introduced into evidence at the hearing, indicates that the AFL represents a substantial number of employees in the unit hereinafter found appropriate.³

We find that a question affecting commerce has arisen concerning the representation of employees of the Company, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

²The original contract reads, in fact, as follows:

“Section 18. Future Changes. The above constitutes an agreement between the Company and its employees, represented by the International Longshoreman's and Warehouseman's Union, Local 1-6, and shall remain in effect unless and until changes become necessary because of conditions beyond the control of the Company or are requested by the employees through their representative.”

Although an extension agreement was executed on July 24, 1945, the indefinite duration clause of the original contract remained unchanged.

³The Field Examiner reported that the AFL submitted 212 authorization cards; that 7 were undated and 205 dated August, 1945, and that there were 330 employees in the requested unit. The CIO relied upon its contract as establishing its interest in the proceeding.

IV. The Appropriate Unit

We find, substantially in accord with an agreement of the parties, that all production, maintenance, warehouse, mechanical, and laboratory employees at the Company's Berkeley, California, plant, including non-technical and non-professional laboratory employees, watchmen, assistant foremen, and working foremen,⁴ but excluding office and clerical employees, chemists, foremen and all or any other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

V. The Determination of Representatives

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the payroll period immediately preceding the date of the Direction of Election herein, subject to the limitations and additions set forth in the Direction.

Direction of Election

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9

⁴The record reveals that the assistant foremen and working foremen, while exercising some directive authority, do not come within the Board's customary supervisory definition.

(c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 3, as amended, it is hereby

Directed that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with Colgate-Palmolive-Peet Company, Berkeley, California, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Twentieth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Sections 10 and 11, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the payroll period immediately preceding the date of this Direction, including employees who did not work during the said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, to determine whether they desire to be represented by International Chemical Workers Union, AFL, or by International Longshoremen's and Warehousemen's Local 6, CIO, for the purposes of collective bargaining, or by neither.

Signed at Washington, D. C., this 26th day of
September, 1945.

PAUL M. HERZOG,
Chairman.

GERARD D. REILLY,
Member.

JOHN M. HOUSTON,
Member.

[Seal]

NATIONAL LABOR
RELATIONS BOARD

Received Oct. 3, 1945.

BOARD'S EXHIBIT No. 15

	Date for Which First Paid	Seniority Date	Position
Hixson, Glenn	9/ 1/45	2/11/24	Ass't Foreman—Pdr. Dept.
Alegre, Manuel	9/ 7/45	4/ 9/24	Frame Setter
Barboui, Vincent	9/ 1/45	3/21/27	Soap Blower
Heppeler, Martin	9/ 1/45	8/ 1/27	Ass't Stock Man
Zulaica, Albert	9/ 1/45	2/20/28	Gang Leader—Toilet Dept.
Rigo, Calixto	8/30/45	7/31/28	Checker—Shipping Dept.
Marshall, Frank	7/30/45	10/29/28	Stock Man
Sherman, Wm.	7/31/45	6/14/29	Ass't Shipping Clerk—T. A. Whse.
Ramirez, Sebastian	9/ 1/45	9/23/29	Pipefitter Helper
Azevedo, Thomas	8/30/45	9/24/29	Machinist Helper
Smith, Harry	7/30/45	10/15/30	Checker—Shipping Dept.
Olsen, Lincoln	7/31/45	10/18/32	Machinist
Perucca, John	9/ 7/45	5/ 4/33	Oiler
Hellbaum, Henry	8/30/45	5/16/33	Extra Man Boiler Room
Lee, Alden	9/ 1/45	2/19/34	Packing Supply Man
Moreau, Sanford	7/30/45	2/23/34	Electrician Helper
Anderson, Terry	9/ 1/45	2/24/34	Carpenter
Howard, Wm.	9/ 1/45	3/31/36	Pipefitter
Luchsinger, Dave	7/30/45	6/10/36	Laborer—Roustabout Dept.
Richmond, Frank	9/ 5/45	8/18/36	Marker—T. A. Whse.

Date for Which First Paid	Seniority Date	Position
Ashworth, Robert	8/30/45	Hitney Driver
Denkowski, Felix	9/ 1/45	Batch Mixer & Soap Blower
Haynes, Clyde	7/30/45	Checker—T. A. Whse.
Lomborg, Harold	7/31/45	Temporary Pipefitter Helper
Munoz, Manuel	8/30/45	Packer—T. A. Whse.
Thompson, Edwin	7/31/45	Ass't Tower Man
Tate, Nick	8/30/45	Pump Man
Souza, Manuel	9/ 1/45	Box Strapper
Navarro, Edward	9/11/45	Batch Mixer & Soap Blower
Gianarelli, Henry	9/ 1/45	Batch Mixer & Soap Blower
Pereira, Cactano	9/ 1/45	Salt Man
Cerrato, Ann	9/ 1/45	Machine Operator
Norris, Kay	9/ 1/45	Packer
Ros, Rose	9/ 1/45	Machine Operator
Paige, Ima Mae	9/ 1/45	Packer
Reyes, Ophelia	9/ 1/45	Packer
Young, Genevieve	9/ 1/45	Machine Operator
Gilbert, Rose	9/13/45	Scterouter

Received Jan. 10, 1946.

RESPONDENT'S EXHIBIT No. 1

August 6, 1945

Progress Report

The present attempt to use the Hitler tactics of stirring up race hatred is apparent, due to the activities of those who are afraid they will lose their strangle-hold on the workers. All people, regardless of race, color or creed, are and have been working with us. A statement has been made that the International Chemical Workers Union, A. F. of L., discriminates against colored people. Nothing could be further from the truth. Chemical Workers Union will neither favor nor dis-favor anyone for his God-given birth status. There is not and never has been any race distinction in the issue at this plant. The attempt to insert it into events is proof enough in itself that the charges against our former officials are true, and some issue had to be brought into the picture to shield and draw attention away from the real issues. All of you remember our good friend, Bill Hunter, colored, who was the janitor at 158 Grand Avenue.

In Local No. 160 of the International Chemical Workers Union, Fresno, there are about 300 members, of which 275 are colored. There are two other Locals belonging to the International Chemical Workers Union which are 100% colored. They are accorded full rights and benefits that any other member is entitled to. They have full vote in the Council, and one of their members, Roy Fitzgerald, is a member of the Resolutions Committee of the

District Council. Anyone who discriminates in the International Chemical Workers Union will be expelled from membership. All that the employees of this plant are asking is to express their choice of the Union they want to belong to. Surely the Warehousemen's Union is American enough to leave it up to the employees.

General meeting for Peet's employees, Wednesday, August 8th, 4:15 p.m. Finnish Brotherhood Hall, 1970 Chestnut St., Berkeley.

Note: Dues and fees will be collected at the Finnish Brotherhood Hall, between 3:00 p.m., to 6:00 p.m., Daily.

RESPONDENT'S EXHIBIT No. 2

Progress Report

August 7, 1945

Information From Your International Chemical Workers Union Committee

What Kind of Union Do We Intend to Have? The answer to that question is:

1. We shall have a Union that will be controlled by the workers.
2. We shall set the time and place for Our meetings.
3. We shall instruct our officials what we want them to do and have them assist us in doing it.
4. We shall elect our own officers, control our own money, dues and assessments.
5. We shall have meetings twice a month at a

hall close to the plant. If the membership desires the meetings will begin at 4:15 p.m., and adjourn as soon as we have completed our business.

6. We shall have the right to have meetings that will center around Our wages, working conditions, problems, and welfare.

7. We Will Not Stand for Anyone, Big or Small, Telling Us That We Have to Do This or That Because "They" voted for "It" Over in San Francisco.

Stewards Position

We do not intend to stand Any trial under dictator influence of the former officials. Such a trial would merely be a stage show—designed to impress a lot of people—the verdict would already be determined—Guilty! For what? Our right of free speech? Our right to Fight for the wishes of the membership? We are now members of the International Chemical Workers Union, A.F.L., we are in the Chemical industry and have no connection with the Warehouse group.

What Caused the Lid to Blow Off (Truth Not Lies)

Building up over the last year and a half—the two most recent items were—first the suspension of our stewards. Imagine if you please—over a year ago we carried out one of our few remaining rights, to elect, by an overwhelming majority, the Stewards of Our choice. At the time an attempt was made to shove in some characters who no one wanted. We took a secret ballot and defeated them

without question. But in doing so we left a sore spot which has never quite healed. The result being that "they" have been gunning for the Stewards and their friends who voted for them ever since. When the Stewards got sick at being snipped at, fed up on carrying out responsibility that should have been carried out by the officials, and felt they had a right to voice a protest, they were immediately ordered discharged by the Union. Prior to and leading up to this are such events as trying to obtain a paper from WLB, regarding vacation rates, Which Was Down at the Union Hall for Two (2) Solid Months, and in spite of requests, pleading, and almost begging, we could not get the officials to bring that one little piece of paper out to the plant. Is it our dues or our welfare they are interested in?

Another recent event showing the interest of our Former officials, was a clear cut case of a broken contract, and in the meeting that lasted about two and a half (2½) hours, our supposed-to-be business agent strained himself with the grand total of just eight (8) words which were in answer to a direct question. What Would You Call Such Events? Lazy? Stupid? Or plain disregard for the rights of employees at this plant? We are sure we don't know the answer to That question, but—Brothers and Sisters, we are sure of one thing, No One Is Going to Fire Our Stewards without a H—— of a fight. That, Brothers and Sisters, Is Just What Happened!

Let Us Repeat (There Is Not and Never Has Been Any Racial Issue). This Lie in Itself Ought

to Convince Those Who Would String Along With,
and Pay Money to Elements That Would Stoop to
Such a Trick!

Don't Forget!

Important news at your general meeting for
Peet's employees, Wednesday, August 8th, 4:15 p.m.
Finnish Brotherhood Hall, 1970 Chestnut Street,
Berkeley.

You can contact Your Union from 9:00 a.m., to
3:00 p.m., at Highgate 5922, and from 3:00 p.m.,
to 6:00 p.m., at Berkeley 8807.

Watch for Your Progress Report, we will be along
again tomorrow.

Note: Dues and fees will be collected at the Fin-
nish Brotherhood Hall, between 3:00 p.m., to 6:00
p.m., Daily.

RESPONDENT'S EXHIBIT No. 3

Progress Report

August 10, 1945

Preliminary conference was held August 9th at
10:30 a.m., before Merle D. Vincent, Jr., NLRB.
The Warehousemen's Union Refused the American
rights of the Colgate-Palmolive-Peet Soap Company
employees to choose their rightful collective bar-
gaining agents. The Soap industry, a manufactur-
ing plant, deals with a chemically made soap. The
employees in this plant belong in the chemical in-
dustry. You are chemical workers and can never

receive your rightful rates of pay as long as you remain in the Warehousemen's Union. The chemical rates for the majority of persons employed in this plant are much higher than you are now receiving.

Among your officers chosen to fight for you and represent you is Brother Eugene Lasaret-May. He was chosen by the membership because of his intelligence, leadership and sincerity. We are certain that the unanimous election of Brother Lasaret-May to the office of Vice-President of Your International Chemical Workers Union is a great advantage to all concerned.

The signed membership to date in the International Chemical Workers Union is well Over the two hundred (200) mark. Your Charter has been sent for and will be here in a few weeks.

The firm position of the Stewards and Committee was conspicuous in contrast to the shaky position held by the Warehouse Officials. When your Stewards declared that the Warehousemen's Union did not respect the wishes of the membership at this plant they were certainly right. Before the NLRB the Warehousemen's Union Officials refused to permit you the American right of self organization and a chance to select your own bargaining agent by an election. The Warehouse Union fears the results of an election and freedom of choice! They are compelling us to take action which will result in the Government ordering a formal hearing and then forcing the Warehouse Union to an election.

When the new contract and rights are securely

in the hands of the employees again, a regular election by secret ballot will be held to determine your permanent officers and Stewards. Anyone in good standing with International Chemical Workers Union will have the opportunity to assume the duties of these offices.

We Sincerely thank those people who participated in our meetings, and have shown their sincere desire to select their own bargaining agent.

RESPONDENT'S EXHIBIT No. 4

September 12, 1945

Bulletin No. 10

In view of the fact that we, as employees of C.P.P. Co., have been temporarily deprived of the right to exercise our American rights of free thought and speech, handed down to us by our forefathers, we find it necessary to use this letter as a medium for expressing our thoughts and speech.

Four of the biggest wars ever engaged in by this country were fought so men, women and children could have the right that our Creator meant us to have.

- 1—The Revolutionary War—fought to free us from enslavement by England.
- 2—The Civil War—fought to free the colored race from enslavement by the white race.
- 3—World War I—fought to prevent Germany from enslaving the rest of the world.

4—World War II—just concluded, the biggest and costliest in the history of man, fought to prevent the Germans, Italian and Japanese and other dictators from enslaving the rest of the world and destroying Democracy.

All of these wars have ended in favor of freedom and liberty. However, we now have a few individuals right here in our midst who act and smell as if they might be descendants of Adolph Hitler. None of the individuals that we are going to speak of took any part in this last war just concluded. We don't think they even know why this war was fought. Maybe they think it was just a little show to see who had the biggest guns and the most and largest aeroplanes and ships. We don't believe these individuals know or care anything about our United States Constitution and the Bill of Rights, freedom of thought, freedom of action, freedom of speech, and freedom to choose their own representatives. If they have ever heard of them, they are undoubtedly too stupid to grasp the meaning of them. For their information; the Constitution of the United States and the Bill of Rights give all Americans the right to legally do as they please and say what they want, as long as they stay within the laws of the country. No one has the right to tell others how they should live their lives. The four wars mentioned above were fought to eliminate individuals such as these mentioned above.

In this last war millions of men, women and children sacrificed their existence on this earth to free the world of such individuals and millions of others

will suffer the rest of their lives. True, many of us have been deprived the means to our food, clothing and shelter, because we had the courage to be real Americans and thought our own thoughts, disagreed with that which we hated and despised; but this is only temporary. To those of you who want to know—They Will Be Back. Your rights, and ours, even though it is a temporary sacrifice for us, will be safe-guarded and restored. There will be an election in the very near future. Do not believe the lies that Chuck Grube is spreading around.

It is hard to believe that a few unscrupulous (which means 'without principle') individuals can go into a plant such as C.P.P. Company and tell the management what to do, kick the employees around, permit such men as Chuck Grube to continue to insult his fellow-workers and try to coerce them and change their minds and even fire who they please. However, the wheels of justice grind slow but sure and in a matter of time these individuals will reap what they are sowing. We have decided that there is no individual, or group of individuals, big enough to take our American rights away from us, that have been protected and retained for us who are still alive at such a terrible cost in death and suffering.

We have just started to fight and we don't intend to quit until we have been freed from enslavement in the C.I.O.

RESPONDENT'S EXHIBIT No. 5

September 15, 1945

Bulletin Number 11—Progress Report

Where is all the democracy that the officials of the Warehousemen's Union have been howling about?

All of you know, of course, about the secret meeting held last Wednesday. Aren't secret meetings supposed to be banned? Nevertheless, they had one and had such famous people as Fearless Ed, and of course, dear little Georgie Squires was there, the people's choice—ha! ha!

We hear their attorney was the main speaker of the evening and he had a wonderful crowd of almost 23 people. At the meeting it was pointed out that your Progress Report made them very nervous and they didn't like what was in it. Why? Because it is the truth. We also hear their attorney admitted that there would be an election held at Peet's in less than two weeks, and all those terrible things that are in your bulletin must be stopped.

That's what Hitler said about the allied underground of the freedom-loving peoples of the nations he conquered and crushed. However, even Hitler knew he was beaten, and these dictators know it too. The employees of Peet's are not beaten or crushed and they know they will win, and soon. Even if the management has permitted Chuck Grube to intimidate, coerce and browbeat their employees in the plant. Even if the Company has taken the interpretation of that phony contract that

the Warehousemen's officials told them to take. Even if the Company did fire loyal employees because they had the courage to be Americans. There are a lot of people in the plant who would certainly like to know what Mr. Woods found out when he took certain employees for a drink last Monday. Of course, the Company is supposed to be neutral.

The dirty, little, yellow sheet put out by the Warehousemen's Union says, "Be sure to elect stewards from your departments." They elected stewards all right, not the people at Peet's, so that those stooges could join hands with the Company and get a lot of people who had the guts to say they didn't like the Communist controlled organization around them discharged. It so happens there are stewards in Peet's—elected by the employees there and the Warehouseman's Union would certainly give a good deal to know who they are. You can be sure they are not stewards whom the Warehousemen's Union and the Company choose to recognize as such. You can be sure there are no Fearless Eds or Georgie Squires included.

A telegram has been received from the National Labor Relations Board in Washington and our case is being worked on and we expect to have some very good news for you in the near future. You will have an election not far off from today. Those employees who were discharged will have the right to vote. Remember, those 47 men and women who were discharged in behalf of all of us have not lost faith.

Read your bulletins and be sure to see that they are distributed. A meeting will be held in the near

future and we will look forward to seeing all of you there.

There will not be a meeting Monday, September 17th, unless you are further notified.

RESPONDENT'S EXHIBIT No. 6

September 18, 1945.

Bulletin No. 12—Progress Report

In the last meeting of the Warehousemen's Union, Local 1-6, C.I.O., they tried to raise the dues seventy-five cents. Do you remember when it was stated by officials of the Warehousemen's Union that dues would not be raised? When they said our stewards were liars? Well, this proves who told the lie. Our stewards were one hundred per cent correct.

We believe a good many employees at Peet's would like to know what happened to the money that was supposed to go to the American Allied War Relief Fund. We understand that they had a mighty tough time about putting over the seventy-five cent raise in dues. We understand it was voted down twice in the same meeting but by hook or crook it was put through. Remember—"By their works thou shalt know them." A labor union is only as good as the officials who guide the destiny of that union and you can see what's happened to the Warehousemen's Union—Ahem.

Paul Heide must have been very embarrassed

when every person called to be a member of the Trial Committee refused to accept. We understand Heide was angry and stated that he was surprised that there was so little interest shown. Weren't the people interested in the C.I.O.? After refusal, a Trial Committee was selected. May be pulled the names out of his pocket—just in case. Certainly no one would want to be on a Trial Committee to try people for freedom of speech and the courage of their own American convictions, and we salute those people who refused. Did you know that it was stated at the meeting that Sherman, Lonnberg and Thompson would not be given a trial—that they were through? Is that American? Are they dictators that they can say who shall be through and who shall not be through? We know the employees of Peet's will give them their answer and fling the challenge of freedom in their faces. If tactics such as these are permitted, dictatorship will spread over our entire nation.

In the Labor Herald of September 13, the Warehousemen's Officials must have known that the majority of the employees of Peet's disliked and considered as intruders Charlie Leacock, Fearless Ed Bopp, George Squires and Manuel Da Cruz, so they gave their life histories and told them how badly these men want the C.I.O. Well, when this election is over, they will probably need the C.I.O. Leacock says, "I don't ask them to do what I say, just because I say it—I just ask them to do the right thing." Leacock, you tell the people who to do and you expect them to do it. The employees at Peet's

don't need to be told the right thing to do—they already know. Maybe these men need to find out what the functions of stewards are. They should know that stewards are supposed to fight for the people and be their servants, not dictators, not threaten the people with what will happen to them if they don't do so and so. Leacock stated, "The Warehousemen have been organized at Colgate-Palmolive Peet Company since 1936. We organized and got these benefits." Maybe Heide & Co. should tell Leacock the truth. Evidently they haven't, so we will. The people at Peet's didn't know the Warehousemen's Union existed in 1936. The employees belonged to I.L.A. and a Federal Labor Union in 1936. The Warehousemen's Union never secured any benefits for the employees. It was the workers, through their own stewards, elected by the majority of the employees, who made conditions as they are. Fearless Ed says, "Leacock's right, they'll just have to start negotiating over again." It is about time, isn't it? Fearless Ed says, "The air needed to be cleared up." Fearless, you're right, the air will be cleared up and you, Leacock, Squires, and Manuel Da Cruz, will know just what we mean. Remember, you cannot tamper with the people's freedom. Remember, you cannot threaten, browbeat, and curse American men and women. Remember, you cannot—not in America—take people's food, clothing and shelter and their right to a decent, honest living from them, because you might not like them—and there isn't room in American for anyone like that. Remember, "A new broom sweeps clean."

When the International Chemical Workers Union, Local 233, wins this election, and as soon as possible thereafter, there will be a hiring hall, centrally located, for the members of the International Chemical Union, Local 233.

RESPONDENT'S EXHIBIT No. 7

September 27, 1945

Bulletin No. 13—Progress Report

No doubt all of you have met the new Shop Steward, Pauline Goulard. Cute tricks the C.I.O. officials are pulling these days. Yes, it is true, approximately fifteen persons, out of 330 employees, voted to have Pauline be the Shop Steward. The C.I.O. officials met certain employees at the gate just before midnight. Funny—we could never get them out before. Now they are out at the plant day and night. Wonder why? Is it because they know an election is very, very near? Now, all the so-called stewards are just one big, happy family. They think they have the Company behind them, and they will have a lot of fun, threatening and browbeating their fellow workers, but they are only fooling themselves. No wonder the employees of Peet's intend to vote for the International Chemical Workers Union, A.F.L. At least they'll get a square deal there.

Remember the man the Company put on Super-suds as packer? Did he get the women's rate of pay? No, he received a man's rate of pay for doing

the same work under the same conditions. That's the fault of the C.I.O. officials. The International Chemical Workers Union, A.F.L., believes that when a woman does the same work, under the same conditions as a man, she should receive the same rate of pay. Why do the women in Colgate-Palmolive Peet Company pay union dues into the C.I.O. for that sort of treatment? We now have a chance to change that system, and a lot of other undemocratic, un-American methods that have been going on in that plant since the C.I.O. came up there.

About that election—The rumor from Mr. Wood's office, that was spread throughout the plant, could have been true. Mr. Howard received a telegram from Washington, stating that a decision would probably be handed down this week. That could have been last Monday. Mr. Crum, the Company attorney, was in Washington last Monday and could have telephoned Mr. Woods about our election. The National Labor Relations Board in Washington, after their decision, would Air Mail the letter to the Regional Board in San Francisco, and then the parties involved would get together and set the date. Mr. Howard called the N.L.R.B. Tuesday afternoon and they had not heard of any decision. He called Mr. Woods and Mr. Woods denied that Mr. Crum had called him and told him an election had been ordered. However, we know an election will be ordered—and soon—and we know the I.L.W.U., Local 1-6, C.I.O., will lose that election and we will have a people's organization, run by the employees, for the employees, and we also know that a "new broom sweeps clean."

Those men and women whose livelihoods were taken away from them, because they stood up and fought for the rights of all of us, are faithful and enduring and know that you are backing them up.

Of course you know of the marvelous fight now under way, against the adoption of a new union constitution, by the Marine Cooks and Stewards Association, C.I.O., and of the paper they are issuing, showing definitely what a grip the Communists are trying to get on our American men and women. You will hear more about this later.

We want you to know that another group of employees, all colored, from another company, have now joined your local, International Chemical Workers Union, A.F.L., Local 233, and they will be initiated, with your approval, at your next meeting. The International Chemical Workers Union, A.F.L., Local 233, sincerely invites every negro at Colgate-Palmolive Peet Company to become a member.

By the way gals—how do you like your wonderful raise of five cents, and also your wonderful raise to \$3.00 dues? They gave you five cents and took it right away from you and made you pay the C.I.O. Nice game, if you can work it.

You will be notified of any official moves. If you are in doubt, or hear any rumors, or you have anything you feel the membership should know, you know who to get in touch with, and what will be done about it.

RESPONDENT'S EXHIBIT No. 8

September 29, 1945.

Bulletin No. 14—Progress Report

At 3:15, Friday afternoon, a Special Delivery, Air Mail letter was received from Washington, and in it was the announcement all of us have been waiting for. The election has been ordered by the Nation Labor Relations Board in Washington, D. C., and signed, sealed and delivered to us. We wonder how Heide & Co. feel now. How the Company feels, when they said they had a valid contract. When they kicked our brothers, sisters, friends, wives and husbands out of the plant.

Mr. Howard will meet with the National Labor Relations Board, officials of the Warehousemen's Union, and the Company, just as soon as it can possibly be arranged, the early part of next week, and set the day for the election.

The order directing the election states, "We hereby direct that the question concerning representation shall be resolved by an election by secret ballot among the employees who were employed during the payroll period immediately preceding the day of this direction (September 26, 1945), including employees who did not work during said payroll period because they were ill, or on vacation or temporarily laid off, to determine whether they desire to be represented by the International Chemical Workers' Union, A.F.L., Local 233, or by the International Longshoremen's and Warehousemen's Union, C.I.O., Local 1-6, for the purpose of collec-

tive bargaining." In other words, brothers and sisters, we knew what we were doing and, as you have already found out, the C.I.O. officials and the Company did not know what they were doing; they guessed.

Those men and women whose livelihood has been taken from them shall return, and they shall vote. There will be several special meetings in the near future and almost everyone who works at the plant shall be allowed to attend. Wait for your next Progress Report.

Those of you who wish to pay dues will be able to pay them at the meeting, as usual.

Once again, the International Chemical Workers' Union, A.F.L., wishes to invite every colored man and woman in that plant into the International Chemical Workers' Union, Local 233, A.F.L. We want you, and we want you to know that your problems will be everyone's problems. Remember—"All for one, and one for all."

RESPONDENT'S EXHIBIT No. 9

October 2, 1945.

Bulletin No. 15—Progress Report

Important!

There will be a special meeting Wednesday afternoon at 4:15, at the Finnish Brotherhood Hall, Mr. Howard and the Union Committee will meet with the Company officials and the C. I. O. officials

and decide the actual date of the election. Be sure to be there to find out the date and have all of your questions answered.

Once again, the International Chemical Workers Union, Local 233, A.F.L., extends a sincere invitation to all of the colored people in this plant to join the International Chemical Workers Union, Local 233, A.F.L. and be present at the meeting. This meeting will be open to almost every employee at Peet's.

Your September and October dues will be accepted Wednesday afternoon at the meeting. Remember, now is the time to get on the winning side.

RESPONDENT'S EXHIBIT No. 10

October 9, 1945

Bulletin No. 16—Progress Report

Many of us have read the very, very phony bulletin put out by the Warehousemen's Union, C.I.O. They mention that wages, sick leave, working conditions, closed shop agreements, pensions, seniority and future job security will be at stake when you cast your ballot. How right they are! They talk about future job security. There will be no future job security if the C.I.O. wins this election. They have already kicked out and taken away the means of livelihood of 45 employees, and from what we hear, if the C.I.O. wins, there are 150 or more names

Respondent's Exhibit No. 10—(Continued)
on their list. One of those might be you. How do you know?

Why don't the Warehouse Officials tell the truth? Since when did the C.I.O. ever give us any pensions, seniority, closed shop, working conditions (ahem!) and—so far as our wages are concerned, we are chemical workers, not warehousemen, and can never receive Chemical Workers' rates (they are much higher), so long as we are members of the Warehousemen's Union, Local 1-6, C.I.O. Our wages have been low, and the treatment afforded the women in that plant by the C.I.O. Officials is the rottenest deal so far. As far as their program goes, anyone should be able to see through that. There is nothing new about a forty hour work week, and the minimum for men and women is certainly "baloney."

How can we trust the C. I. O. Officials when they have betrayed us and lied to us in the past? What assurance have we that they will not continue to do so in the future? The women should have had that five cents increase in 1941—why did they have to wait almost four years to obtain it for them? Paul Heide admitted, under oath, that they hadn't even prepared a schedule for approval from the War Labor Board. Regarding the penalty for hard and dirty work—the Chemical Workers' Union has had that for almost five years.

They said they had recently received over \$12,000.00 in back pay for shift workers and women.

How come some of the workers at Clorax went back four months (1st day of June 1944) and ours only went back to October 12, 1944. Quite a little difference, eh? At Port Chicago the Chemical Workers Union has just won a case of almost \$150,000.00 in back pay, not for women alone, but for everyone (and there are only half as many workers there as at Peet's), and have one of the finest agreements in the country. West Vaco Chemical Company, Newark, has an outstanding agreement in wages and fine conditions, and there were only five or six persons voting in the election at West Vaco.

They asked if Chemical Workers Union, A.F.L. is strong enough locally and nationally to achieve demands for more wages, shorter hours and better working conditions. Not only are we strong enough, but we have in effect agreements throughout the State of California, since the close of the war, which have taken care of post-war problems, 25% increases, equal pay for equal work for women, closed shops, and numerous other advantages, and we don't have to strike to get them. The International Chemical Workers Union believes strikes should not be called, except as a last resort. Evidently the C.I.O. is not interested in your food, clothing and shelter and how you get it, when they call a strike or kick somebody off the job. We hear that the C.I.O. Officials want to pull a big strike at Colgate-Palmolive Peet Company, if they win this election. Are you prepared to go on strike for the C.I.O. for a couple of months?

Not only is the Chemical Workers Union strong

enough to get a closed shop for you, but we are strong enough to defeat the C.I.O. in this election by a great majority. They say this election is your life, which is probably true. Life doesn't mean too much to those who do not hesitate to kick people out of their jobs, just because they had the courage to say they didn't like the dictatorial methods of the Warehousemen's Officials. How can we continue to pay our dues to a union that threatens us, prohibits us from going on our jobs, kicks our brothers, sisters and friends out of their jobs, and which has refused, for years, to come down to the plant and help settle our problems? A union which will shove in appointed Shop Stewards who will make people afraid to speak to friends and neighbors on the job, for fear they might lose their own jobs?

Are you still willing to fight for the freedom that is America? Our men and women fought for four, long years across the seas to preserve this freedom—all you have to do to preserve your freedom in this plant is to vote for the Chemical Workers Union, A.F.L., Local 233. Is freedom worth that much to you? We think it is.

Of course, you know of the battle the rank and file committee is putting up in the Marine Cooks and Stewards Union, C.I.O., because of a communist constitution they are trying to shove down the members' throats. Do you know that the officials of the Marine Cooks and Stewards Union, C.I.O., kicked out the most popular members of their union? Remember—a leopard does not change its spots. Certainly, if you are honest with yourself, you cannot

vote for an organization such as that. Remember—it was the Warehouse Officials, C.I.O., who tried (but failed) to inject discrimination into this battle. They are the ones who are continually reminding the negro that he is a negro. They are the ones who are continually telling the negro he is being discriminated against. Surely no one else in this world knows the negro's problems as well as he does, himself, and he does not find it necessary to have these problems brought before him by the C.I.O. Warehouse Officials.

Chemical Workers' Union, Local 233, A.F.L., will win by an overwhelming majority. Don't be frightened by the propaganda put out by the C.I.O.—consider it as such—and vote for the union you know will best represent your interests——

The International Chemical Workers Union
Local 233, A.F.L.

RESPONDENT'S EXHIBIT No. 11

October 11, 1945.

Bulletin No. 17—Progress Report

Isn't it strange that scrap iron from the United States to the Japs was returned to us in the form of bombs and bullets, ready to enslave us and take from us our freedom of speech? Isn't it strange now, that our money that we earned and paid into the Warehouse Union as dues, is being used to pay

the salaries of Warehouse Union Officials, to fight us, kick us off our jobs, threaten us and deny us our freedom of choice and speech? We hope and pray that we do not have to go through another Pearl Harbor, within our own nation, before we recognize an enemy.

We, who have fought for so many years to maintain seniority as a means of security from unjust lay-offs and discharges, have seen our seniority disregarded as a non-existing factor by those we have paid and who are supposed to help us retain it. In reality, they have gone out of their way to destroy in the Colgate-Palmolive Peet Plant the very things it has taken us so long to build. We joined a union to unite our strength and money, to obtain justice from a Company who did not recognize seniority, vacations, relief periods, time and one-half for more than eight hours, double time for Sundays and holidays, shop stewards and our right to bargain collectively. The Warehousemen's Officials and the Warehousemen's Union did not get these rights for us, we, the employees of Colgate-Palmolive Peet Company, obtained these things without their help. We did not force them out of the Company without a long and hard-fought battle. Your Shop Stewards, elected by all the people at Peet's, with your help and your consent, are the ones who achieved them, and when one of our brothers asked the Officials of the Warehousemen's Union for help, they only laughed and said there were more important plants

than Peet's. Our strength was in the united stand we could present.

Now a few selected officials of the Warehousemen's Union have chosen to take the old line Company policy of laying off employees, regardless of seniority, changing them to different departments, regardless of how many years they have put in, kicking them out and taking their means of food, clothing and shelter from them. Is it because they feel they are the supreme authority and have forgotten who gave them their jobs to begin with? Well, brothers and sisters, we have fought this thing before and won and now we are in the fight again and we don't care if it's the Company or the Warehouse Union Officials, or who the H—— it is, we know how to fight and we will and must retain our unity. All 45 employees outside the plant, plus around 300 inside, must have one purpose in mind—defeat the phony Warehousemen's Union, C.I.O., officials in the coming election by voting for the International Chemical Workers' Union, Local 233, A.F.L., by such a huge majority that the company and the former union will never again attempt to trample on our rights.

Remember, the Company is watching this very closely and thousands of men and women in labor are also watching this election very closely. Dare we fail so many? Even if we win by a close majority, the Company might take the position that we are divided so——

We must win by a huge vote.

Not one of us can leave even the most remote

item undone. Nothing, regardless of how small, must be overlooked. Talk to your fellow-workers, see that they understand the issues, be sure they get there to vote. Remember, the time is short now and you must be alert to avoid being left in the clutches of a thing, which in the opinion of many, would stop at nothing.

Because of the lies and deceit of the Warehouse Union Officials, we realize some confusion prevails in the plant, so we must make two things clear:

(1) Any employee of Peet's, who was hired between July 31, 1945, and September 23, 1945, who has been required to pay an initiation fee to the Warehouse Union, between the above dates, will not be required to pay another initiation fee to the Chemical Workers Union, Local 233, A.L.F.

(2) All those employed at Peet's, prior to July 31, 1945 (who have not already joined), need only pay \$2.00 Initiation Fee to become members of this fighting union.

The election will be held Tuesday, October 16, 1945, in the Clubhouse, 7th and Pardee Streets, Berkeley; 6:00 a. m. to 8:30 a.m. and 2:00 p. m. to 5:30 p. m. Remember, this may be your last opportunity to save yourself and others from a real strangle-hold. This fight goes far deeper than just union against union. Sinister purposes, deep-seated hatred, long standing vengeance—are very likely to be your reward if we should, by chance, lose this election. So, for your own sake, do what you can now.

RESPONDENT'S EXHIBIT No. 12

October 12, 1945.

Bulletin No. 18—Progress Report

How long must we continue to be threatened, coerced and intimidated? How long must we continue to permit C.I.O. officials to stop us on the streets and ask us who we will vote for? Don't they know this is America—that our vote is secret and they will know only too well how we have voted by 7:30 Tuesday night? They will know only too well that we have won by a large majority and rejected their un-American, communistic, slimy tactics. How long must we continue to permit men with the intelligence of Leacock to physically attack our own people in the plant we have helped build? Yes, it is true, Leacock, having authority for the first time in his life, asked one of our brothers on the job who he was voting for and when our brother said it was none of his D—— business, Leacock followed him up the stairs and attempted to beat him up. Lucky for Leacock that our brother kept his head or he might have been in the hospital today. Are these the kind of stewards you want to represent you for better wages, hours and conditions of employment? The day of the club is over—we must have statesmen—intelligence—to win our battles—not ignorance. However, the C.I.O. Warehousemen officials believe in threatening, coercing and frightening people to the extent that they do not even dare to say who they are for on their own job for fear they will be kicked out.

Did you hear about the strike the C. I. O. officials want to pull at Peet's when this is over? Are you prepared to pound the pavements without any money for two or three months? In order to save yourself from this, be sure to vote in the Right Hand Corner of your ballot next Tuesday, for the Chemical Workers' Union, A.F.L. Remember, all laid off employees who were temporarily kicked out by the dirty tactics of the C.I.O. officials will vote in the Right Hand Corner for the Chemical Workers Union, A.F.L. Remember, there are 150 or more employees that the C.I.O. officials have already got ear-marked to kick out of their jobs if they win this election. So get your friends—talk to them—see them on the job—on the street—in their homes—and tell them, in order to save their jobs they must vote for the Chemical Worker's Union, A.F.L., in the Right Hand Corner. Remember—we welcome into the Chemical Workers Union, A.F.L., any employee who is honest and decent, regardless of his race, creed or color. The C.I.O. officials are the ones who have continually brought up the racial issue. Don't be fooled—they are only seeking to divide and conquer.

The International Chemical Worker's Union, Local 233, A.F.L., has a fine contract drawn up ready to be considered by all parties concerned, just as soon as this election is over, and it will increase your wages and better the hours and working conditions in that plant. Remember—you are Chemical Workers and you can never receive the high Chemical Worker's rates if you vote for the Warehousemen's

Union. We do not intend for anyone to work for less than \$1.00 an hour in that plant, man or woman, equal pay for equal work for women—and many other conditions—and above all—freedom to do and say what you want without fear of being kicked out of your job.

Vote for the Chemical Worker's Union, A.F.L., in
the Right Hand Corner of Your Ballot

Don't forget the special meeting for the swing shift workers at 1:00 o'clock, in the Finnish Brotherhood Hall, Monday, October 15th, and the special meeting for the day workers at 4:15 P.M. of the same day. Don't be afraid to attend—the C.I.O. won't be able to hurt you any more.

You don't need to have your book with you or your dues paid up in order to vote. The United States Government regards you as employees only and this election is being held to determine what union you wish to belong to.

RESPONDENT'S EXHIBIT No. 13

October 13, 1945.

Bulletin No. 19—Progress Report

Remember?

Remember when we were forced to pay political action dues and our money was spent in behalf of candidates we were actually against? Was all our money that was forced from us spent for the pur-

pose it was intended for—or was it spent for—something else?

Remember when officials of the Warehouse Union, C.I.O., forced us to buy dance tickets and if we didn't, we couldn't pay our dues and if we didn't pay our dues we were kicked out or fined. Remember they didn't even consult the membership—just forced us to buy them—or else?

Remember when our stewards requested the Warehouse officials to come to Peet's to adjust our differences and they refused? Remember? Remember months that many of us didn't even see an official of the Warehouse Union? They were willing to take our dues but gave us nothing in return for them.

Remember when the members who worked at Peet's went to a meeting and we had nothing to say about our problems? * * * They were decided by strangers and people from other plants.

Remember when the Warehouse officials and the Company officials said we could not have an election? When the Company permitted Chuck Grube and the officials of the Company to say we would not have an election until February, 1946? When the Company permitted certain employees to brow-beat, lie, threaten and coerce the employees under them?

Remember when our dues were \$1.50 per month and we had three doctors and \$250.00 death benefit? Remember * * * the C.I.O. officials took these conditions away from us * * * they said too much

money was going for sick benefits. (As if they cared whether the people were sick or well.)

Remember when the Warehouse Officials, C.I.O., transferred around sixty thousand dollars from the death benefit fund to the general fund? Why? What happened to our money? Remember when they said they would not raise the dues and in less than eighteen months they decided to raise them and had their stooges at the meeting and did raise them—over our protests? And remember, they are now forcing the women to pay the same dues because they got a raise of a few cents. Did you know the Warehouse Union officials are planning to raise the dues to \$4.00 per month? * * * If they win * * * which they won't! Remember, when we decided to stand behind our stewards because they fought for our rights? When you walked out for two and a half days because you were determined to stand up and see that your American privileges were not trampled upon?

Remember when we delegated four employees to meet with the Management in behalf of our stewards and when they arrived they met the officials of the Warehouse Union, C.I.O.? Remember how they were insulted in the Management's offices and then kicked out of their jobs?

Remember when 25 men stopped 8 women and 5 men and would not even let them go on plant property, and when the women proved their books were paid up, those lousey C.I.O. officials just laughed and kicked them off their jobs.

Remember when the Warehouse Union, C.I.O., arranged to inject some phoney stewards over us, and when some of those phoney stewards let a little power go to their heads and tore some of our fellow-employees' shirts from them because they decided to vote differently?

Remember when one of those stewards and some strangers went into the plant on one shift and threatened one of our people if they continued to even talk about the A. F. of L.?

We Must Vote for the Chemical Workers' Union, A.F.L., in the Right Hand Corner.

We must, and will, destroy this rule-by-force. For they cannot kick our pals out—they cannot kick any of us out. Let's vote in the Right Hand Corner—for a free union.

Remember, it is for you to decide—Democratic freedom (the right to speak—to think—to act—as Americans) or do you prefer threats, violence and dictatorship of the C.I.O. branch of communism—Vote in the Right Hand Corner.

Remember, Asia, China, Poland, now completely controlled by Russian Communism * * * next all of Europe * * * America can be next * * * America is the last hold out of Freedom * * * Vote in the Right Hand Corner.

Remember—your vote now saves your future security, your job, your home, your American rights, your country, from the curse of communism. Vote in the Right Hand Corner.

Remember—your boy and mine * * * do you want

them to come home to fight our battles here on the home front, too? Vote in the Right Hand Corner.

Remember—Divide and conquer is the program of all dictatorships. We must all Vote in the Right Hand Corner to show our strength.

Remember the struggle of the C.I.O. (tool of Communist Russia) is seeking to divide working men and women against each other!

Remember—the C.I.O. will use color, race and creed to divide and conquer. Your militant effort Now can change the tide. Our future is too important to let Moscow tell us how to think and act.

RESPONDENT'S EXHIBIT No. 14

Bulletin No. 20—Progress Report

October 15, 1945.

Are You Interested in Dollars and Cents?

The officials of the Warehouse Union are not content with misleading the people, permitting their stewards to coerce their fellow-workers on the job—not content to permit an election based solely on the truth, as a result they sent to the homes of Peet's employees a bulletin showing rates and certain conditions between Peet's employees and West Vaco Chemical Company employees. For the information of the officials of the Warehouse Union, the contract they spoke of was in effect in 1937. We don't know whether this is due to their ignorance and deceitfulness, or just a continuance of the very stupid blunders they have been making, when they

refer to a contract that was done away with over eight years ago. However, even then the employees at West Vaco Chemical Company were receiving swing shift and graveyard differentials and higher rates than are now being paid at Peet's—all this—over eight years ago

For example: What you will receive when you vote in the Right Hand Corner for the Chemical Worker's Union, A.F.L., is as follows:

	Warehousemen's Rates		Chemical Workers Rates
Sea Foam Machine Oper.....	\$.961½		\$1.25
Palmolive Mach. Oper.	1.001½		1.25
All Maintenance Dept. Rates....	1.39	Up to	1.60
Laborers .....	.921½	From	1.00 up
Pressmen .....	.961½		1.11
Driers	1.001½		1.25
Soap Blowers	1.001½		1.25
			Women's Rates
Machine Operator .....	.80		1.00 to 1.11
Soap Packers .....	.75		1.00

Remember—Other facts enter into the working conditions in the plants referred to by the officials of the Warehouse Union, of which they were not aware, or did not care to mention—some are—In many of the plants where the Chemical Worker's Union has contracts, the Company furnishes modern homes for \$18 per month, and furnishes free meals for overtime work in excess of the regular eight hours. Also they have access to Company gardens in which to raise their own food—all chemical plants have been getting shift differentials for years, not just retroactive to October 12, 1944. In most plants where we have Chemical Worker's

Unions, their working clothes are furnished by the Company.

Wouldn't the 45 men and women who have been kicked out of their jobs because they wanted decent working conditions feel silly to return to Peet's at rates far below those they were receiving? Do you think for a moment they would promote a program for lower rates?

Don't let the Warehouse Officials lie to you and get away with it. Chemical Workers are going for rates that will exceed the Warehouse Union scale by At Least 7½¢ per hour. Peet's does not have a closed shop, they only have preferential hiring and the Chemical Workers Union intends to tie up the loose ends of this and many other shameful conditions that have been allowed to exist and enter into a contract with the Company that will make us proud to belong to a union—an honest union is sorely needed in this town and we intend to supply it.

At Springfield Cedar, the employees sweat under a terrible system by agreement of the Warehouse Union and the Company. A piece work system that all real American labor, men and women, should be against. The Officials of the Warehouse Union are permitting the employees of Springfield Cedar to work for rates as low as fifty cents an hour—starvation wages. Why don't they do something about these people, or have they neglected them as they have the employees at Peets? Is it because they fear they will lose your dues if they don't promise \$1.15 per hour?

You are listed as commercial workers and the Warehousemen could not and would not send you to the docks and terminals with a higher rate of pay until every available man holding terminal and dock books, and there are plenty of them, has been sent to work, so—they lied to you again—their contracts mean nothing to you. However, when the Chemical Worker's Union wins this election tomorrow, and just as soon as possible, thereafter, we will have our own hiring hall, owned by you and operated for you.

Remember, all of you who are colored, it is the Warehousemen's Union Officials, C.I.O. who are constantly reminding you of your color. They want to set you against one another so that they may divide and conquer, and we, the Chemical Workers at Colgate-Palmolive-Peet Company sincerely invite you to join the Chemical Worker's Union, A.F.L., by marking (x) in the Right Hand Corner, at the election tomorrow.

Remember this election is to determine which union you wish to join and no one knows, not even the Warehouse Officials, how you vote—you alone know that, but in case you become confused, mark (x) in the Right Hand Corner.

What is left of the Warehouse Union contract at Peet's will be through, done and over with when you vote Tuesday in the Right Hand Corner.

Correction: Bulletin 19 — typographical error "we had three doctors" corrected statement to read "we had free doctors".

RESPONDENT'S EXHIBIT No. 15

Sample Ballot

“Vote Right in the Right Hand Corner”

United States of America
National Labor Relations Board

Official Secret Ballot

This ballot is to determine the collective bargaining representative, if any, for the unit in which you are employed. If you spoil this ballot, return it to the Board Agent for a new one.

Mark an “X” in the square of your choice

International
Longshoremen and
Whs'men Union
Local 1-6
C. I. O.

NO UNION

International
Chemical Workers
Union Local No. 233
A. F. L.

[]

[]

[x]

Remember

(Take me to the polls with you)

(1) Remember—Your job is at stake in this election.

(2) Remember—To Vote for Your own Union, Control Your own money, Elect Your own Officers and Stewards.

(3) Remember—This is Your country, are You willing to sacrifice it for Communism!

(4) Remember—Your vote in the “Right Hand Corner” will return Your friends back to work, (They fought for you—you vote for them) also protect Your future.

Place Your "X" in the Right Hand Corner
Bring Us Back to Work

Your Stewards and Friends Fought for You—
Vote for Us and Have a Good Clean Union

RESPONDENT'S EXHIBIT No. 16

[Warehouse Union Letterhead.]

July 31, 1945.

Colgate, Palmolive, Peet Company,
6th & Carlton Streets,
Berkeley, California.

Att.: Mr. C. A. Altman

Dear Mr. Altman:—

This is to notify you that the employees named below have been suspended from membership in this union and are no longer members in good standing.

Pending the determination of charges which have been filed against these persons in accordance with our Constitution and By-Laws, you are requested, in accordance with our Agreement, to remove these persons from your employ until such time as you receive word from us in regard to their status as members in this union.

Ed Thompson, 1034 Virginia Street, Berkeley,
Calif.

H. Lonnberg, 1245 - 60th Avenue, Oakland,
Calif.

Lincoln Olsen, 623 Kearney, El Cerrito, Calif.

William Sherman, 1515 Kains Avenue, Berkeley,
Calif.

Your immediate attention to this request will be
appreciated.

Very truly yours,

/s/ PAUL HEIDE,
Vice-President.

PH:ES

owu-cio

Special Delivery

INTERVENER'S EXHIBIT No. 1

[Stamped] Warehouse Union Local 6, ILWU
158 Grand Avenue, Oakland 12, Calif.

July 28, 1945.

Mr. Frank Marshall,
Rt. 1, Box 241,
Walnut Creek, Calif.

In accordance with Article 15, Sections 1, 2 & 3,
and in accordance with Section 7 of the same Article,
of the Constitution of Warehouse Union, Local
6, International Longshoremen's & Warehousemen's
Union, you are hereby notified that charges are preferred
against you for the following violations of
the Constitution and By-Laws of this organization:

1. Violation of Declaration of Principles.
2. Violation of Oath of Membership.
3. Violation of Article 9, Section 1.

You are hereby notified that in accordance with Section 14, of Article 15, the Executive Committee finds that there is good cause to believe the charges to be true, and you are, therefore, suspended as a member of this Local as of this date, losing all rights and privileges, pending a trial as provided for in Article 15 of the Constitution of Warehouse Union, Local 6, ILWU.

/s/ PAUL HEIDE,

Vice-President for the General Executive Board.

PH:ES

owu-cio

Registered—Return Receipt Requested.

INTERVENER'S EXHIBIT No. 2

Employees Welfare Ass'n.

July 30th, 1945: (4:15 P.M.) Finnish Brotherhood Hall, 1970 Chestnut St., Berkeley, Calif.

Wm. Sherman, President,

E. H. Thompson, Rec. Sec.

An address by Bro. Thompson stressing fact of past policy of present bargaining agents, I.L.W.U., and what our future course of action should be.

Motion by Thompson that we withdraw from the C. I. O. and International Longshoremens and Warehousemen's Union District #1 Local 6. Form an Independent Union and seek affiliation with another International. Motion seconded. Vote carried unanimously in favor 205 opposed None.

Motion that we go back to work tomorrow morning pending settlement of 5 Brothers Shop Stewards laid off by management at request of I.L.W.U. officials. If shop Steward don't work, nobody works. Carried unanimously.

Motion is Ed Bopp be allowed to work only if he discontinue being I.L.W.U. Shop Steward. P. S.: Bopp appointed Shop Steward by I.L.W.U. officials July 30th P.M.

Motion to elect a two (2) member negotiating Committee. Nominated and seconded, were E. H. Thompson, Wm. Sherman, H. Lonnberg and Lincoln Olsen. An amendment to the motion that the 4 members nominated to be elected amendment seconded. Amendment carried and motion carried unanimously.

Motion to elect 2 trustees. Motion seconded. Bill Stolba, Carl Carlson, Ralph Hugel, Gleen Hixson and Chas. Scutti nominated. Sloba—72 Carlson—19 Hiegel—62, Hixson—93, Scutti—19. Hixson and Stolba elected.

General discussion about getting 5 Shop Stewards back on the job. P. S. 5 Shop Stewards, H. Smith, Frank Marshall, Clyde Haynes, Sanford Moreau and Dave Luchsinger were by motion duly made and seconded which unanimously to hold office as Steward till elections are held.

Official Report

July 30th, 1945: Wm. Stolba, L. Olsen, Dave Luchsinger, Wm. Sherman, E. H. Thompson following general meeting visited an attorney for legal

reasons as to best way to complete severing relations with I.L.W.U. 1-6. Telegrams were sent to I.L.W.U. 1-6. Oakland and San Francisco, Calif.

Telegram was also sent to Bert Railey, Mgr., C.P.P. Co.; 800 Carlton St., Berkeley, Calif.

You are hereby notified of action taken by more than 200 employees of C.P.P. Co., all being former members of I.L.W.U. 1-6 and being more than 50% of total employees have withdrawn and severed relations with I.L.W.U. as collective bargaining agent.

Adjournment.

E. H. THOMPSON,
Rec. Sec.

INTERVENER'S EXHIBIT No. 3

July 31st, 1945 (12:00) (Noon)

The meeting was called to order by Bill Sherman.

The discussion started out with some of the things that took place this morning. July 31st at the plant.

1. Mainly the rehiring of our shop steward.

Suggestion carried that we choose one man from each department to be a source of information by phone for future action.

1. Tom Azevedo—Sea Foam—Trin. 8618.

Al Zullaci—Toilet Dept.—Thorn. 7041.

Terry Anderson—Carpenter—Kellogg 42442 Sw 8009.

W. C. Howard—Pipe Shop.

Henry Hellbawm—Boiler—La 5-0487.

Discussion that took place, a vote was taken again to continue the meeting until shop Stewards all returned to work. One suggested that they be put to work in the office. Railey opposed it as yet.

Meeting continued till Aug. 2, 1945. 5:00 PM.

New Employees representative on job.

Martin Heppler—

Manuel Allegre—

Bob Ashworth

Closed Meeting August 2, 1945. 5:00 P.M.

Motion was duly made and seconded to employ Harvey E. Howard, as Labor Consultant, and grant him the power to sign all necessary papers for the employees of Colgate-Palmolive-Peet Co. relative to Wages, Hours and conditions of employment. Motion carried unanimous.

Motion was duly made and seconded that the Employees Welfare Association of the Colgate-Palmolive-Peet Co. be disbanded and affiliation and membership in the International Chemical Workers Union, A.F.L., be applied for. Unanimously carried.

Motion was made and seconded that L. Olsen be authorized to sign all necessary papers with Harvey E. Howard. Unanimously carried.

Motion was made and seconded that all employees return to work pending a National Labor Relations Board election. Motion carried. A collection was

called for the help defray expenses and \$87.50 was received.

Adjournment.

E. H. THOMPSON,
Rec. Sec.

INTERVENER'S EXHIBIT No. 4

Warehouse Union—C.I.O.

Local 6

158 Grand Avenue, Oakland 12, Calif.

Higate 5045

Mr. Harold Lonnberg

1245 60th Ave.

Oakland, Calif.

July 31, 1945.

In accordance with Article 15, Sections 1, 2 & 3, and in accordance with Section 7 of the same Article, of the Constitution of Warehouse Union, Local 6, International Longshoremen's & Warehousemen's Union, you are hereby notified that charges are preferred against you for the following violations of the constitution and By-Laws of this organization:

1. Violation of Declaration of Principles.
2. Violation of Oath of Membership.
3. Violation of Article 9, Section 1.

You are hereby notified that in accordance with Section 14, of Article 15, the Executive Committee finds that there is good cause to believe the charges to be true, and you are, therefore, suspended as a member of this Local as of this date, losing all rights and privileges, pending a trial as provided for in

Article 15 of the Constitution of Warehouse Union,
Local 6, ILWU.

/s/ PAUL HEIDE,

Vice-President for the Gen-
eral Executive Board.

PH:ES

Owu-CIO

Registered—Return Receipt Requested.

Received Aug. 31, 1945.

INTERVENER'S EXHIBIT No. 5

Constitution, By-Laws and Rules of Order. Ware-
house Union, Local 6, International Longshore-
men and Warehousemen's Union.

Declaration of Principles

We, the warehouse men and women of San Fran-
cisco and Bay Tributaries, in order to build and
maintain a strong Union organization; provide for
the defense of our common interests; promote the
general welfare of our members and other wage
earners and uphold the rights and dignity of our
labor and its organized expression, have determined
that we shall be guided by the following principles:

1. An injury to one is an injury to all.
2. All rights and duties belong, without discrim-
ination, to each member of the organization as long
as they comply with the rules of the organization.
3. The right of each member to receive such a

fair and just return for his labor as will make possible sufficient leisure for education and recreation.

4. The right to be treated in a decent and respectful manner by the employer at all times.

5. To use all possible safety measures in our work as not to injure brother and sister members; to promote good will among the wage earners in our industries, and to reduce the great hazards of our occupation.

6. To regulate our conduct, both as a union member and as individuals, so as to raise the living standards of those employed in our industry and make our occupation what it should be, an honest and secure means of earning a decent livelihood, protection against accident, sickness and old age.

7. To assist other unions whenever possible in their resistance to attacks on their wages and working conditions and for the attainment of their demands.

8. Basing ourselves upon these principles, we are determined to do everything within our power, collectively and individually, and as an important sector of the organized labor movement, to promote the best interests of our members, and other wage earners when this becomes necessary, believing as we do that the solidarity of the labor movement is the only way to preserve and improve the living standards of wage earners.

9. We pledge ourselves to labor united and for the principles set forth herein to perpetuate our Union and to work concertedly with the general labor movement to bring about the highest standard

of living to all workers and have adopted the following Constitution, By-Laws and Rules to aid us in abiding by these principles.

* * *

Article IX

Membership Duties

Section 1. The first duty of each member is to be a true and loyal member of this Local; to foster and advance all objectives beneficial to the cause of labor; to purchase only union-made goods, and not to patronize any place where unfair labor is employed.

* * *

Obligation

I do most solemnly on my honor affirm that during my association with the Warehouse Union, Local 6, I will remain a true and faithful member, observe its laws, and labor as far as lies within my power to further the advancement of my trade so that my fellowmen can receive and enjoy with me the just fruits of our labor; that I will attend the meetings of this Union as often as it is possible for me to do so; that I will not reveal, unless by permission, any of the workings that may at any time be confided in me; and I do further promise to assist a member of the Warehouse Union, Local 6, when and wherever I may find him or her in distress; that I will never knowingly commit an act injurious to the interests of him or her, but will help to preserve the rights of his or her household

inviolable; and finally I will strive to create a fraternal feeling between our Union and organizations who mean to uphold the dignity of labor, and affirm the nobility of all who earn their bread by the sweat of their brow; that I will not deal in any manner with any person who is an enemy of labor. To this I pledge my honor.

INTERVENER'S EXHIBIT No. 6

Before

Warehouse Union, Local 6

International Longshoremen's & Warehousemen's
Union

In the Matter of

WAREHOUSE UNION, LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, CIO,

Plaintiff,

vs.

CLYDE W. HAYNES, DAVE LUCHSINGER, FRANK MARSHALL, SANFORD MOREAU, HARRY A. SMITH, H. LONNBERG, LINCOLN OLSEN, ED THOMPSON and WILLIAM SHERMAN,

Defendants.

DECISION OF TRIAL COMMITTEE

The members of this Trial Committee were chosen by drawing lots at a regular meeting of the

Union, as provided in Article XV, Section 6, of the Constitution of Warehouse Union, Local No. 6 (ILWU). Brother Nelson Wilson was chosen as Chairman.

None of the members of this Trial Committee knew anything personally about this case before the trial or has an axe to grind. We are a rank and file committee and we have tried to decide this case fairly on the evidence presented at the trial and nothing else. Everything we say here is the unanimous opinion of all of us.

The trial was held in the Green Room at 158 Grand Avenue, Oakland, California, on October 3, 1945. The four signers of this decision, Brothers Nelson Wilson, Claude Larrabee, Frank Carabello and Johnny Wilson, showed up at the trial, but Brother Manuel Farias was unable to attend. Paul Heide was prosecutor.

Brother Heide put in the record an affidavit showing that the charges had been sent by registered mail to all the nine defendants,

Clyde W. Haynes	H. Lonnberg
Dave Luchsinger	Lincoln Olsen
Frank Marshall	Ed Thompson
Sanford Moreau	William Sherman
Harry A. Smith	

He also put in the record return receipts from the post office showing that all these defendants had gotten the charges, except William Sherman, and his letter was returned by the post office showing he refused to accept it. Under Section 7 of Article

XV all that is necessary is that the charges must be mailed by registered mail, and it does not prevent the trial if the defendant refuses to accept the charges.

None of the defendants showed up at the trial. This brings up Section 11 of Article XV which says that if the accused fails to appear for trial without an excuse which satisfies the Trial Committee, such failure to appear may be considered by the Committee as conclusive proof of guilt. Two of the defendants, Frank Marshall and Harry A. Smith, wrote in at the last minute claiming to be sick, but they didn't show any doctor's certificate or anything except their own statement. The Committee gave a lot of thought to this matter and decided that the excuses were not good ones and were made just for delay.

The charges were then read and the Chairman asked for pleas of guilty or not guilty. Naturally since the defendants didn't show up, no pleas were made. However, we decided that we were not going to rely on Section 11 and insisted on hearing the evidence in the case.

The charges against Brothers Haynes, Luchsinger, Marshall, Moreau and Smith, the shop stewards at Colgate-Palmolive-Peet, are as follows:

We, the undersigned, members of Warehouse Union, Local 6, I.L.W.U., hereby bring charges against the following members of the Union for violations of the Constitution of Warehouse Union, Local 6, I.L.W.U., and

specifically for violating the Oath of Obligation, the Preamble, the Declaration of Principles, and the provisions of Article 9, "Membership Duties," of the Constitution:

Clyde W. Haynes	0-1280
Dave Luchsinger	0-1152
Frank Marshall	0- 757
Sanford Moreau	0-1921
Harry A. Smith	0- 790

We also charge the above-named members with the following specific violations of our Constitution and our Union policies, as adopted by majority vote of the membership:

1. Attaching and violating the no-discrimination policy of the I.L.W.U.
2. Using their positions as Stewards to spread false and misleading information among the membership concerning the policy and program of the Union, the activities and position of the Union officers, the status of the Union treasury and the status of the contract between the Union and Colgate-Palmolive-Peet Company.
3. Encouraging non-payment of dues and non-attendance at Union meetings by members whom they were responsible to check and keep in good standing.
4. Failure and refusal to honestly represent the grievances of members employed by the Company.
5. Refusal to post all bulletins and official

notices submitted to them by the Union officers in conformity with regular Union procedure and with actions taken by the Union membership.

6. Conspiring with enemies of the I.L.W.U. and of the labor movement to destroy the Union.

Louis Gonick	0-2343	Jim Nelson	0-2192
Name	Book #	Name	Book #
Charles Duarte	0- 817	Joe Gomes	0-1581
Name	Book #	Name	Book #
George Canete	0- 140	Charles Murray	0 132
Name	Book #	Name	Book #
Lauro Cortez	0-2253	David A. Wilson	0-2276
Name	Book #	Name	Book #

The charges against Brothers Lonnberg, Olsen, Thompson and Sherman are as follows:

We, the undersigned, members of Warehouse Union, Local 6, I.L.W.U., hereby bring charges against the following members of the Union for violations of the Constitution of Warehouse Union, Local 6, I.L.W.U., and specifically for violating the Oath of Obligation, the Preamble, the Declaration of Principles, and the provisions of Article 9, "Membership Duties," of the Constitution:

H. Lonnberg	0-1900
Lincoln Olsen	0-1941
Ed Thompson	0-1982
William Sherman	0- 788

We also charge the above-named members of the Union with the following specific violations of our Constitution and our Union policies, as adopted by majority vote of the membership:

1. Attacking and violating the no-discrimination policy of the I.L.W.U.

2. Deliberately spreading false and misleading information among the Union membership concerning the policies and program of the I.L.W.U., the activities and the position of the Union Officers, the status of the Union treasury and the status of the contract between the Union and Colgate-Palmolive-Peet Company.

3. Conspiring with enemies of the labor movement to weaken and destroy the I.L.W.U.

4. Leading a movement for non-payment of dues and non-attendance at Union meetings among the membership at Colgate-Palmolive-Peet Company.

5. Making libelous and defamatory statements concerning other members of the Union.

6. Promoting and leading a strike at the Colgate-Palmolive-Peet Company in open violation of the Union's no-strike pledge.

Louis Gonick 0-2343 Jim Nelson 0-2192

Name	Book #	Name	Book #
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Charles Duarte	0- 817	Joe Gomes	0-1581
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Name	Book #	Name	Book #
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George Canete	0- 140	Charles Murray	0- 132
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Name	Book #	Name	Book #
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Lauro Cortez	0-2253	David A. Wilson	0-2276
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Name	Book #	Name	Book #
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We will take up first the charges against former Shop Stewards Haynes, Luchsinger, Marshall, Moreau and Smith. The testimony showed that these men have been working against the established policies of the union for a long time. For example, the Union's policies against discrimination on account of race or color. Back in the early part of 1944 Marshall refused to take up the beef of a Negro member at Peet's named Harrison because he "didn't like him." The other stewards backed him up on this and all of them were taken before the Grievance Committee and found guilty of conduct unbecoming stewards and given a reprimand for their treatment of this Negro brother. Then there was the Ulysses Norman case, where a union member at Peet's said out loud in the dressing room that there are too many Negroes in the Union, the quicker we get them out the better (only he didn't say "Negro.") Brother Norman, who is a Negro, filed charges against the brother who made this statement. Defendants Marshall and Sherman publicly defended the right of this member to make such attacks on Negro fellow members. The position of the ILWU against spreading race hatred and prejudice is well known and has brought much praise to the organization. We believe that defendants Marshall and Sherman were working against the best interests of the Union by taking this position and were violating the principles of the Union and their oath of membership.

There was a lot of evidence showing that all of the stewards fell way down on the job when it came

to carrying out the duties of their office. For instance, they refused to put Section 10 of the Peets contract into effect, which called for setting up stewards for each department. They refused to select a Chief Steward as required by the contract. They showed poor judgment in regard to what grievances to present to the management. They pushed many phony grievances. They failed to attend meetings of the Executive Council, which was their duty as stewards, and also membership meetings. This was a poor example for rank and file members, in regard to attending union meetings. It all mounts up in our opinion to sabotage of the steward's job.

The Union's political action program took a bad beating from the stewards. For instance they refused to carry out the mandate of the union membership in regard to financial support for the National Citizens Political Action Committee. They sabotaged collection of funds for the defense of Harry Bridges, President of the ILWU. They opposed the program for wiping out the Little Steel formula. They bucked the Union's program in regard to enforcing OPA regulations.

Toward the end of May, 1945, they even refused to call a meeting of the employees at Peet's to discuss current contract negotiations, air the grievances of the rank and file and elect stewards for the coming year. Brother Lou Gonick, Business Agent, demanded three separate times that they arrange to call such a meeting, but the stewards kept putting him off with phony excuses, and after they finally

agreed to call a meeting they broke their promise, claimed they forgot all about calling the meeting. Marshall, Smith and Haynes were the ringleaders but all five of them played this game. Finally Brother Gonick went ahead and made his own arrangements for the meeting and gave the stewards notices of the meeting to post, but they refused to post them. This was bound to hurt the Union in the eyes of the employees. It prevented the Union's officers from contacting the membership at Peet's and giving them a first-hand account of their activities, especially the current contract negotiations. We believe the stewards were clearly guilty of working against the best interests of the Union and its members.

The Trial Committee gave a lot of thought to the evidence in this case and we are unanimously to the effect that these defendants, Haynes, Luchsinger, Marshall, Moreau and Smith are guilty of the charges. It is too bad that they didn't show up themselves because we would have liked to hear their side of the story. But they had a fair chance to appear and they didn't take it, and so we have got to make our decision on the evidence in the record, and on that evidence we have got to find them guilty.

On the question of punishment, as provided in Article XV, Section 9, of the Constitution. We think these men have betrayed their trust as officers of this Union and have shown themselves to be unfit for further membership in our organization. Therefore we unanimously recommend that

Clyde W. Haynes, Dave Luchsinger, Frank Marshall, Sanford Moreau and Harry A. Smith be expelled from this Union.

In regard to the second set of charges, against Lonnberg, Olsen, Thompson and Sherman, the evidence showed that these four men were responsible for pulling the only wartime strike that members of this Local ever were guilty of. Our Union has a right to be proud of its record in regard to the wartime no-strike pledge, which was 100% except for what happened at Peet's. Their leadership in the strike at Peet's on August 1, 2 and 3, 1945, was responsible for stopping production of thousands of gallons of glycerine, a vital war material needed by our armed forces in the field. This is very serious, because nothing could give the Union and the labor movement more of a black eye, when our nation was fighting for its life against its enemies.

On top of this, the evidence shows that three of these men, Sherman, Thompson and Lonnberg, made libelous and defamatory charges against Paul Heide and other officials of the Union, such as being racketeers, looting the Union's treasury and so forth. The payoff is that none of these men ever brought charges against Heide or any other Union officer under the Constitution, although under Article XV, Section 1, they were duty-bound to do this. Or even made any charge of misconduct on the floor, at a union meeting, although they had plenty of opportunity to do this. We disapprove very strongly of such wild and irresponsible conduct.

One thing we want to make very clear. We do

not hold it against these men, or any of the other defendants, that they apparently joined the A F of L Chemical Workers Union. If they thought the men could get a better deal through the A F of L, that was their right under the Wagner Act, as we understand it, just as A F of L members have the right to change to the CIO if they want to. After all, that is a question for the rank and file to decide. Undermining union policies is something else. Policies such as political action, equal rights for all races and colors, and the wartime no-strike pledge are fundamental to the welfare of the Union and its members. The union cannot and should not tolerate such conduct.

We declare that defendants H. Lonnberg, Lincoln Olsen, Ed Thompson and William Sherman are guilty of the charges. We recommend that they lose all rights as union members and be expelled from this organization.

October 10, 1945.

/s/ CLAUDE M. LARRABEE,

/s/ JOHNNY WILSON,

/s/ NELSON WILSON,

/s/ FRANK CARABALLO.

INTERVENER'S EXHIBIT No. 7

Before: Warehouse Union, Local 6, International
Longshoremen's & Warehousemen's Union

In the Matter of

WAREHOUSE UNION, Local 6, INTERNA-
TIONAL LONGSHOREMEN'S & WARE-
HOUSEMEN'S UNION, CIO,

Plaintiff,

vs.

MANUEL ALEGRE, TERRY ANDERSON,
ROBERT ASHWORTH, TONNY AZEVEDO,
VINCENT BARBONI, ANN CERRATO,
FELIX DENKOWSKI, HENRY GIANNA-
RELLI, HENRY HELLBAUM, MARTIN
HEPPLER, GLEN HIXON, WILLIAM
HOWARD, ALDEN LEE, MANUEL MU-
NOZ, KAY NORRIS, INA PAIGE, K. PE-
RIERA, JOHN PERUCCA, MIKE RAMIE-
REZ, CALIXTO RIGO, OPHELIA REYES,
F. L. RICHMOND, ROSE ROS, MAN-
UEL SOUZA, NICK TATE, GENEVIEVE
YOUNG, ALBERT ZULAICA,

Defendants.

DECISION OF TRIAL COMMITTEE

We, the members of the Trial Committee, being
Brother P. Lind, Chairman; Brother M. Pavalini,
Brother Joe Quartarola, Brother J. Silva, and

Brother M. Freitas, have met together and reached our decision in the case of the members at Colgate-Palmolive-Peets who went on strike.

The charges filed against defendants Nick Tate, Robert Ashworth, Manuel Munoz, Tommy Azevedo, Calixto Rigo and Henry Hellbaum were as follows:

We, the undersigned members of Warehouse Union, Local 6, ILWU, hereby bring charges against the following members of the Union for violation of the Constitution of Warehouse Union, Local 6, ILWU, and specifically for violating the declaration of principles, oath of membership, and Article 9, Section 1:

Nick Tate

Tommy Azevedo

Robert Ashworth

Calixto Rigo

Manuel Munoz

Henry Hellbaum

We also charge the above named members of the Union with the following specific violations of our Constitution and our Union policies as adopted by majority vote of the membership:

1. Deliberately spreading false and misleading information among the Union membership concerning the policies and program of the ILWU, the activities and position of the Union officers, the status of the Union treasury and the status of the contract between the Union and Colgate, Palmolive, Peet Company.
2. Conspiring with enemies of the labor movement to weaken and destroy the ILWU.

3. Leading a movement for non-payment of dues and non-attendance at Union meetings among the membership at Colgate-Palmolive-Peet Company.
4. Making libelous and defamatory statements concerning the other members of the Union.
5. Promoting and leading a strike at the Colgate-Palmolive-Peet Company in open violation of the Union's no-strike pledge.
6. Persisting, although warned many times to discontinue, in their disruptive and agitational activities which is hampering production and peaceful work of the vast majority of our members at Colgate-Palmolive-Peet Company.

Dated: August 9, 1945.

CHARLES DUARTE,

Book # 0-817.

LOUIS GONICK,

Book # 0-2343.

The charges filed against the rest of the defendants were as follows:

We, the undersigned members of Warehouse Union, Local 6, ILWU, hereby bring charges against the following members of the Union for violation of the Constitution of Warehouse Union, Local 6, ILWU, and specifically for violating the declaration of principles, oath of membership, and Article 9, Section 1:

Rose Ross	Martin Heppler
Esther Young	Bill Howard
Ina M. Paige	Alex Hixon
Ophelia Reyes	Alden Lee
Kay Norris	Al Barboni
Ann Cerrato	Felix Denkowski
Henry Giannarelli	F. L. Richmond
Albert Zulaica	Terry Anderson
Manuel Souza	K. Periera
Manuel Alegre	John Perucca
Mike Ramirez	

Dated: August 9, 1945.

CHARLES DUARTE,

Book # 0-817.

LOUIS GONICK,

Book # 0-2343.

Registered letters setting forth the charges were sent to all the defendants. Also, all the defendants were given bills of particulars.

The trial was held on December 17, 1945, at 8 o'clock P.M. in the Green Room at 158 Grand Avenue, Oakland, and all of the defendants were there. Brother Lind, Chairman, was in charge. After the charges were read, all of the defendants said that they pleaded Not Guilty. A statement was then read for the defendants by Kay Norris, raising several legal points. We have considered these points and do not agree with them. For example, in regard to the statement that the defendants did not get a copy of the charges, each of them received a letter from the Union stating the charges exactly. Fur-

thermore, each one received a bill of particulars stating that the only issue was in regard to fomenting or participating in an unauthorized strike in wartime, in violation of the ILWU's no-strike pledge. All the defendants knew what they were charged with and had a chance to defend themselves.

After the statement was read by Kay Norris, the following defendants walked out of the trial:

Manuel Alegre	Kay Norris
Terry Anderson	Mike Ramiercz
Henry Giannarelli	Ophelia Reyes
Henry Hellbaum	F. L. Richmond
William Howard	Genevieve Young

The rest of the defendants stayed on and were given opportunity to put on a defense.

The evidence showed that on August 1, 2 and 3, 1945, while the United States was at war with Japan, an unauthorized strike was pulled at Colgate-Palmolive-Peet plant in Berkeley, where Local 6 is the bargaining agent. This was in violation of the solemn pledge made by our Union many times during the recent war not to strike until the defeat of our enemies. For example, as late as July 13, 1945, the Union went on record:

“That we reaffirm our wartime No-Strike pledge. The war in the Pacific comes first. The fighting men must receive their weapons and supplies without stint, without interruption or delays of any kind.”

When President Truman came into office the Executive Board adopted the following pledge, which the membership of Local 6 confirmed:

“On behalf of the entire membership of the International Longshoremen’s & Warehousemen’s Union, we renew and give to President Harry S. Truman and the Nation our solemn pledge that until the war is ended with the unconditional surrender of Japan we will not strike, stop work, or cease or slow production for any reason whatsoever.

“We reiterate that this is an unconditional pledge, given in the knowledge that our first duty is to our Nation and that, despite provocation, we must take no action that will imperil our Nation or cause the prolongation of the war or cause the unnecessary loss of so much as one Allied life.

“We further make the positive pledge that we will do everything in our power to shorten the war by lending ourselves to intelligent solution of the manifold manpower problems and to the development of all possible means to speed production.”.

The Trial Committee wishes to point out that the ILWU had a 100% record in regard to upholding this pledge. We all know there was plenty of provocation for strikes during the war, but the members of this Union knew that the boys on Iwo Jima, Tarawa and Kwajelein had a lot of provocation, too. The only black mark on the Union’s 100%

No-Strike record during the war was the wildeat stoppage at Peets. This lasted about two and a half days and held up production of glycerine for the armed forces, a vital war material.

The evidence showed that each of the defendants took part in this unauthorized wartime strike except Rigo and Alegre, and the evidence showed that these two were guilty of fomenting and encouraging the strike. As a matter of fact, the defendants who stayed on at the trial later admitted that they were guilty of participating in the strike. We find that the following defendants are guilty of participating in an unauthorized strike in wartime, contrary to the ILWU's no-strike pledge:

Terry Anderson	Kay Norris
Robert Ashworth	Ina Paige
Tommy Azevedo	K. Periera
Vincent Barboni	John Perucca
Ann Cerrato	Mike Ramierez
Felix Denkowski	Ophelia Reyes
Henry Giammarelli	F. L. Richmond
Henry Hellbaum	Rose Ros
Martin Heppler	Mannuel Souza
Glen Hixon	Nick Tate
William Howard	Genevieve Young
Alden Lee	Albert Zulaica
Manuel Munoz	

We find that the following defendants are guilty of fomenting and encouraging an unauthorized strike in wartime, contrary to the ILWU's no-strike pledge:

Manuel Alegre	Calixto Rigo
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Some of the defendants raised the point that a couple hundred people walked out at Peets and yet only 36 were brought up on charges. The answer is that as a Trial Committee we have the right to try only the people who are charged. We have not got the right to try anybody who is not charged. When somebody is charged, it is the duty of the Trial Committee to decide whether they are guilty or innocent, not to decide whether somebody else is guilty or innocent. The Constitution sets up a perfectly good way of bringing charges against members of this Union and if anybody wants to find out whether the other two hundred members at Peets are guilty of violating the no-strike pledge, let them file charges under the Constitution and bring them to trial. The fact that a lot of other people may be guilty does not excuse these defendants. They are all over 21 and responsible for their actions.

The next question is what should the punishment be. In regard to the ten defendants who walked out and refused to stand trial, they have disgraced the good name of the ILWU and yet their conduct shows that they do not repent of their actions. They are not entitled to any consideration from this organization. We therefore recommend that the following defendants be expelled from the Union and deprived of all their rights and privileges as Union members:

Manuel Alegre	Kay Norris
Terry Anderson	Mike Ramierez
Henry Giannarelli	Ophelia Reyes
Henry Hellbaum	F. L. Richmond
William Howard	Genevieve Young

In regard to the other 17 defendants, the fact that they were willing to stand trial before their fellow members and answer for their actions is a point in their favor. They were honest enough to admit their guilt and asked for lenient treatment from this body. Therefore we make the following recommendation for punishment of:

Robert Ashworth	Ina Paige
Tonny Azevedo	K. Periera
Vincent Barboni	John Perucca
Ann Cerrato	Calixto Rigo
Felix Denkowski	Rose Ros
Martin Heppler	Manuel Souza
Glen Hixon	Nick Tate
Alden Lee	Albert Zulaica
Manuel Munoz	

1. They shall be permanently deprived of their present seniority at Peet's.

2. They shall be put on probation for one year from date, during which time they shall not hold office or trust in the local. At the end of the year the Grievance Committee shall consider their case, and if it finds that they have conducted themselves as good Union members, they shall be restored to all the rights and privileges of members of the Union in good standing.

3. During the period of probation, they shall have the right to work out of the hiring hall and to be employed in Union houses on the same basis as other members of the local, without discrimination.

Dated: December 24, 1945.

PAUL N. LIND,

Chairman.

MANUEL FREITAS,

MARIO J. PAVLINA,

JULIUS R. SILVA,

JOSEPH QUARTAROLO.

INTERVENER'S EXHIBIT No. 8

Before: Warehouse Union, Local 6, International
Longshoremen's & Warehousemen's Union.

In the Matter of:

WAREHOUSE UNION, LOCAL 6, INTERNA-
TIONAL LONGSHOREMEN'S & WARE-
HOUSEMEN'S UNION, CIO,

Plaintiff,

vs.

CLYDE W. HAYNES, DAVE LUCHSINGER,
FRANK MARSHALL, SANFORD MO-
REAU, HARRY A. SMITH, H. LONNBERG,
LINCOLN OLSEN, ED THOMPSON and
WILLIAM SHERMAN,

Defendants.

Board Room, Warehouse Union, Local 6
158 Grand Avenue, Oakland, California

October 3, 1945. 2:30 P.M.

Before Trial Board:

Nelson Wilson, Chairman.

Claude Larrabee

Frank Caraballo

Johnny Wilson

Appearances: On Behalf of the Plaintiff:

Paul Heide, Vice President, Warehouse Union,
Local 6, 158 Grand Avenue, Oakland, California.

Present: Emma Stanley, Office Secretary, Ware-
house Union, Local 6, I.L.W.U., CIO.

Intervener's Exhibit No. 8

Proceedings Before Warehouse Union—(Con't)

PROCEEDINGS

Chairman Wilson: I will now call this meeting to order. May I have two Sergeants at Arms, please?

(Whereupon, two members of Local 6 volunteered as Sergeants at Arms.)

Chairman Wilson: Who is the Prosecutor?

Mr. Heide: I am, Mr. Chairman.

(To the Reporter): Do you want to take my name? Paul Heide, Vice President of the Warehouse Union, Local 6, ILWU.

Chairman Wilson: Brother Larrabee will now read the names of the Defendants.

Mr. Larrabee: The first name is H. Lonnberg. Is Brother Lonnberg present? (No response)

Lincoln Olsen? (No response)

Ed Thompson? (No response)

William Sherman? (No response)

Clyde Haynes? (No response)

Dave Luchsinger? (No response)

Frank Marshall? (No response)

Sanford Moreau? (No response)

Harry A. Smith? (No response)

Chairman Wilson: Are any of you present? (No response)

Mr. Prosecutor, proceed with your case.

Mr. Heide: I think, Mr. Chairman, that the next order in the trial is the reading of the charges.

Intervener's Exhibit No. 8—Proceedings
Before Warehouse Union—(Con't)

The fact that the Defendants are not present here does not prevent the Trial Committee from proceeding with the trial. They have all been duly notified, and evidence will be introduced to show that they have been so notified, in accordance with the Constitution of the Union.

Mr. Larrabee: Do you want me to read the six charges?

Mr. Heide: Mr. Chairman?

Chairman Wilson: Yes.

Mr. Heide: Does the Trial Committee have a copy of the charges that have been filed against the Defendants in this case?

Chairman Wilson: Yes, they have.

Mr. Larrabee: We have a copy here (indicating document).

Mr. Heide: I think it is proper that the charges be read at this time.

Chairman Wilson: Will you read the charges, Mr. Larrabee?

Mr. Larrabee: I will read the charges.

“We, the undersigned, members of Warehouse Union, Local 6, I.L.W.U., hereby bring charges against the following members of the Union for violations of the Constitution of Warehouse Union, Local 6, I.L.W.U., and specifically for violating the Oath of Obligation, the Preamble, the Declaration of Principles,

Intervener's Exhibit No. 8—Proceedings
Before Warehouse Union—(Con't)

and the provisions of Article 9, 'Membership Duties,' of the Constitution:

“Clyde W. Haynes 0-1280

“Dave Luchsinger 0-1152

“Frank Marshall 0-757

“Sanford Moreau 0-1921

“Harry A. Smith 0-790

“We also charge the above-named members of the Union with the following specific violations of our Constitution and our Union policies, as adopted by majority vote of the membership:

“1. Attacking and violating the no-discrimination policy of the I.L.W.U.

“2. Using their positions as Stewards to spread false and misleading information among the membership concerning the policies and program of the Union, the activities and position of the Union officers, the status of the Union treasury and the status of the contract between the Union and Colgate-Palmolive-Peet Company.

“3. Encouraging non-payment of dues and non-attendance at Union meetings by members whom they were responsible to check and keep in good standing.

“4. Failure and refusal to honestly represent the grievances of members employed by the Company.

“5. Refusal to post bulletins and official notices submitted to them by the Union officers

Intervener's Exhibit No. 8—Proceedings
Before Warehouse Union—(Con't)

in conformity with regular Union procedure and with actions taken by the Union membership.

“6. Conspiring with enemies of the I.L.W.U. and of the labor movement to destroy the Union.”

Mr. Grube: Brother Heide, I move at this time that the Secretary read off the charges. I think we will get a clearer understanding of the procedure.

Mr. Larrabee: Will you read this off? (Indicating document)

Chairman Wilson: Is there any objection?

Mr. Grube: It is simply to be read, and no action to be put at this time.

Miss Stanley: You don't want me to re-read this first one, do you?

Mr. Grube: No. I think we have a fair understanding of that.

Miss Stanley (To the Reporter): My name is Emma Stanley. I am the Office Secretary.

“We, the undersigned, members of Warehouse Union, Local 6, I.L.W.U., hereby bring charges against the following members of the Union for violations of the Constitution of Warehouse Union, Local 6, I.L.W.U., and specifically for violating the Oath of Obligation, the Preamble, the Declaration of Principles,

Intervener's Exhibit No. 8—Proceedings
Before Warehouse Union—(Con't)

and the provisions of Article 9, 'Membership Duties,' of the Constitution:

"H. Lonnberg 0-1900

"Lincoln Olsen 0-1941

"Ed Thompson 0-1982

"William Sherman 0-788

"We also charge the above named members of the Union with the following specific violations of our Constitution and our Union policies, as adopted by majority vote of the membership:

"1. Attacking and violating the no-discrimination policy of the I.L.W.U.

"2. Deliberately spreading false and misleading information among the Union membership concerning the policies and program of the I.L.W.U., the activities and the position of the Union officers, the status of the Union treasury and the status of the contract between the Union and Colgate, Palmolive-Peet Company.

"3. Conspiring with enemies of the labor movement to weaken and destroy the I.L.W.U.

"4. Leading a movement for non-payment of dues and non-attendance at Union meetings among the membership at Colgate, Palmolive-Peet Company.

"5. Making libelous and defamatory statements concerning other members of the Union.

"6. Promoting and leading a strike at the

Intervener's Exhibit No. 8—Proceedings
Before Warehouse Union—(Con't)

Colgate, Palmolive-Peet Company in open violation of the Union's no-strike pledge."

These charges have been signed by Louis Gonick, Charles Duarte, George Canete, Lauro Cortez, Jim Nelson, Joe Gomes, Charles Murray and David A. Wilson.

Chairman Wilson: Mr. Prosecutor, will you proceed with your case?

Mr. Heide: Mr. Chairman, I think it would be proper at this time for the Chair to ask if any of the Defendants are present, that they submit their plea at this time, whether guilty or not guilty, and then I will proceed.

Chairman Wilson: Are any of the Defendants present? (No response)

It seems as if not any of them are present.

Mr. Heide: Mr. Chairman, in connection with the Defendants' failure to appear, I would like to point out that Section 11 of Article 15 of the Constitution of Warehouse Union, Local 6 provides as follows:

"If the accused fails to appear for trial without an excuse which satisfies the Trial Committee, such failure to appear may be considered by the Committee as conclusive proof of guilt."

Mr. Chairman, I would now like to submit Exhibit No. 1 for the prosecution, which is the original signed copy of the charges against Clyde W. Haynes,

Intervener's Exhibit No. 8—Proceedings
Before Warehouse Union—(Con't)

Dave Luchsinger, Frank Marshall, Sanford Moreau and Harry Smith, and submit as Prosecution's Exhibit No. 2 the signed copy of the charges, which have already been read, against H. Lonnberg, Lincoln Olsen, Ed Thompson and William Sherman.

I offer as Prosecution's Exhibit No. 3 an affidavit showing that notices of this trial and copies of the charges were served on all of the Defendants.

Exhibit No. 3 reads as follows:

"State of California,
County of Alameda—ss.

"Emma Stanley, being first duly sworn, deposes and says:

"I am a person over the age of twenty-one years and am an employee of Warehouse Union, Local 6, I.L.W.U. On September 20, 1945, I served upon Clyde W. Haynes, Dave Luchsinger, Frank Marshall, Sanford Moreau, and Harry A. Smith, H. Lonnberg, Lincoln Olsen, Ed Thompson and William Sherman, and each of them, by sending to each of these said persons by registered mail, postage fully prepaid, the original of the letters annexed hereto and hereby made a part hereof, addressed to each of such persons, respectively, at the respective addresses stated therein. The letters to Clyde W. Haynes, Dave Luchsinger, Frank Marshall, Sanford Moreau and Harry A. Smith each contained a copy of the Charges annexed hereto and hereby made a part hereof, marked Ex-

Intervener's Exhibit No. 8—Proceedings
Before Warehouse Union—(Con't)

hibit 'A.' The letters to H. Lomberg, Lincoln Olsen, Ed Thompson and William Sherman each contained a copy of the Charges annexed hereto and hereby made a part hereof, marked Exhibit 'B.' Attached to each of said letters, except the letter to William Sherman, and hereby made a part hereof, are the return delivery receipts for said letters and Charges which I received from the United States Post Office, Oakland, California. Attached hereto and hereby made a part hereof, marked Exhibit 'C,' is the letter to William Sherman, which was returned by the United States Post Office by reason of the fact that said William Sherman refused to accept delivery of said letter. The address set forth is the true and correct address of said William Sherman as shown for him on the Union books and he was residing there at the time he refused to accept delivery of the said letter.

“Subscribed and Sworn to Before Me This
3rd Day of October, 1945.

/s/ “EMMA STANLEY.

/s/ “J. B. MORRISON,

“Notary Public in and for the County of Alameda, State of California.”

Chairman Wilson: Is there any objection? (No

Intervener's Exhibit No. 8—Proceedings
Before Warehouse Union—(Con't)

response). If not, the exhibits may be received in evidence.

(Copy of Charges against Clyde W. Haynes, Dave Luchsinger, Frank Marshall, Sanford Moreau and Harry A. Smith was received in evidence and marked Plaintiff's Exhibit No. 1.)

(Copy of Charges against H. Lonnberg, Lincoln Olsen, Ed Thompson, and William Sherman was received in evidence and marked Plaintiff's Exhibit No. 2.)

(Affidavit of Emma Stanley and attached documents were received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Heide: Mr. Chairman, I would like to call as the first witness for the prosecution, Charles Duarte.

CHARLES DUARTE

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heide:

Q. Will you state your name and position with the Union?

A. Charles Duarte, Business Agent, Oakland Unit, Local 6, ILWU, Book No. 0-817.

Q. Do you know Clyde W. Haynes, Dave Luch-

Intervener's Exhibit No. 8—Proceedings
Before Warehouse Union—(Con't)

(Testimony of Charles Duarte.)

singer, Frank Marshall, Sanford Moreau and Harry Smith, who are Defendants in this case?

A. I do.

Q. Who are they?

A. They were formerly the Stewards at the Colgate-Palmolive-Peet Company.

Q. Are you familiar with their activities as Shop Stewards at that plant? A. I am.

Q. Did they always work together as one group, that is, collectively? A. They did.

Q. Are you familiar with the grievance of a Negro Union brother at Peet's, named Harrison?

A. I was involved in the Carlyle Harrison case at the time Brother Harrison was discharged from his job for coming in a few minutes late, I believe it was on a Saturday.

Q. Will you just answer the question "Yes" or "No?" A. Yes.

Q. Are you familiar with that case?

A. I am.

Q. Will you state what occurred in connection with the handling of the grievance?

A. Brother Harrison came to me and stated that the Stewards at Colgate-Palmolive-Peet's had not taken his case to a final conclusion. I immediately went out to Colgate-Palmolive-Peet's and discussed it with the various Stewards, the Stewards named here. I was told by Marshall that the reason he did not want to take the beef up was because he did

Intervener's Exhibit No. 8—Proceedings
Before Warehouse Union—(Con't)

(Testimony of Charles Duarte.)

not like Harrison, and Harrison did not like him. The rest of the Stewards took the same position, that they did not want to take the case any further. I then immediately came back to my office and filed a grievance slip, which is a notification to appear before the Grievance Committee. I charged them on the Grievance Committee slip with conduct unbecoming stewards. They attended the next Grievance Committee meeting, at which time the whole case was threshed out, and were reprimanded by the Grievance Committee for their actions.

Following this we had a meeting with the Employer, the Union taking the position that the man was unjustly discharged, the Company taking the position that he was justly discharged, and the next step was to be arbitration.

In the interim between the meeting of the Grievance Committee and the question of going to arbitration, which, under our organization, means we must first get approval of the Executive Board, Brother Harrison then went to work as a long-shoremen in ILWU, Local 10, and informed me that he did not want to take his case any further.

Q. About what date did this incident occur?

A. This occurred in '44, I think prior to that—

Mr. Grube: A point of information.

A. (Continuing): I think it was some time the latter part of '44.

Intervener's Exhibit No. 8—Proceedings
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(Testimony of Charles Duarte.)

Mr. Grube: Brother Heide, a point of information.

Chairman Wilson: Just a moment, Brother.

A. (Continuing): I may be wrong. It might have been the first part of '45.

Q. (By Mr. Heide): Is it correct that this incident you referred to was in March or April of 1944? A. That is about right.

Q. Preceding an annual House Meeting of the Colgate-Palmolive-Peet Company employees?

A. I would say that is correct.

Q. Do you recall a grievance in connection with penalty time?

A. There had been some discussion at Peet's, and a series of letters I believe had been written between our office, the Stewards and our attorneys, regarding penalty time. I went out and sat in a Grievance Committee meeting that the Stewards held every Monday with the Employers, and took the position that under the contract the section (which I cannot name) provided that anyone that worked over five hours without a meal was entitled to penalty time, meaning time and a half or the straight time overtime rate, such as the case may be.

At this meeting it was decided that a check should be made of the employees who considered themselves eligible for this penalty time. I made the suggestion at the meeting that one of the Stewards contact the employees in the particular de-

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partments, and that we would get these claims and submit them to the Company, and the Company would pay the valid claims, and if there were any claims, if there was any question about it, the Union would take them into the grievance machinery and settle them in that manner.

Q. In both of these cases, these two incidents or grievances you have testified to, were the Stewards involved the Stewards that were previously named, who are Defendants in this trial—

A. Yes, they were.

Q. —at the time that these grievances arose?

A. Right. I just wanted to add one thing.

At this meeting, the Secretary of the Grievance or Bargaining Committee, which consisted of these five Stewards, was Harry Smith, and at this meeting he took it upon himself, on this recommendation that I made, to get this survey so that we could file a claim for our penalty time, because the Company took the position that anyone who had a valid claim and was entitled to their penalty time would be paid, but that because of the fact that there was some confusion regarding who was entitled to it, that everybody was going to make a claim that they would just as soon take the valid cases, pay them, and we could discuss the others. Smith took it upon himself to say that he would follow it up, and to my knowledge, to this day, that survey has never been made, and that survey has never been

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brought to the attention of the Company and to my knowledge no one has ever been paid the penalty time that they have coming.

Q. Do you recall the occasion in March or April of 1945 when the issue of collecting contributions for the Harry Bridges deportation case came up in the Union? A. I do.

Q. Will you state what happened in connection with that matter?

A. The Union membership unanimously went on record to support the Bridges case, something that they have been doing ever since the first Bridges case.

Previous to this Union meeting, the Stewards Council, representing all of the Stewards, representing all of our people in the various houses, took the same position.

The Chairman of the Stewards Council, at the time this motion was passed, was Frank Marshall, one of the Defendants. There was no opposition, at the Stewards Council meeting, no opposition on the floor of the Union meeting. The collections were based on a voluntary basis, where members could give anything from \$1 to \$50 or \$100, or give nothing. All of the Stewards became active in participating in the Bridges defense, with one shining example of non-cooperation, Colgate-Palmolive-Peet.

The Stewards collected at Peet's—I think Mar-

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shall collected \$21 in toto. None of the other Stewards collected a nickel, it was claimed, or it might have been put in as all the Stewards collected under Marshall.

But, in order to get the drive moving, it became necessary to go out and investigate, and find out what was being done, and we found that the Stewards were actually sabotaging it by refusing to discuss it with anyone, or refusing to attempt to collect any money for the Bridges defense.

The officers sat down and discussed the question, and the people at Peet's who in the past had supported all of the Bridges trials and had supported the Bridges defense fund then set up a committee out there and Brother Bopp, who was not on the Stewards Committee as such, collected \$70, which was an indication to us that the Stewards had not even attempted to carry out the policy as enunciated by the membership or by the Stewards Council, of which Marshall was Chairman. There were other brothers who collected a total of about \$38 to \$40.

This, in the light of the fact that the Stewards as a whole collected \$21, comprising five people, and three other people collected a total of over \$100, brought to our attention the fact that these people were not cooperating and were not going along with Union policy, and when I say "policy" in this instance I mean the mandate of the membership that

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the Bridges Defense Committee should be supported unanimously.

Q. Do you recall an occasion in September of 1944 when the matter of contributions to the National Citizens Political Action Committee came up in the Union? A. I do.

Q. Will you tell what the Stewards at Colgate-Palmolive-Peet did in regard to that matter?

A. The story is practically identical. Marshall, who was still the Chairman of the Stewards Council, sat in with the Stewards Council, and unanimously recommended the voluntary contributions that were put out in receipt form for the National PAC, National Citizens Political Action Committee. These were booklets, were triplicate receipts for donations for members of our Union donating from fifty cents to any sum up to, I believe, \$10,000, where the Smith-Connally Act prevented any more. We did not get any \$10,000 donations.

The Stewards as a group, or the Stewards Council as a group took it upon themselves to act as collectors for this particular campaign, this campaign being the elections in '44, the Roosevelt election, the Stewards as a whole took it upon themselves to be collectors in this particular campaign.

The same story occurred again, where the Stewards refused to cooperate, refused to contact any of the people on the job, although our people at Peet's were 99 per cent behind the Political Action drive

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or the program of the Administration, and were willing and ready to support PAC in electing to Congress those representatives best fitted to represent the workers.

The same thing occurred again, where it was necessary for the officials to contact rank and filers on the job in order to get the message down to the people and to make the collections as such.

Mr. Heide: Mr. Chairman, the next question I want to ask concerns a provision of the contract now in effect between this Union and Colgate-Palmolive-Peet Company. I do not have a copy of that contract here. If we could have just a moment, the Secretary has gone to get the contract.

(Short recess.)

Q. (By Mr. Heide): I have here a copy of the contract with the Colgate-Palmolive-Peet Company. I call your attention to Section 10 in the contract. That sections calls for the setting up of Department Stewards, doesn't it? A. That's correct.

Q. What if anything did the Stewards do about that particular contract provision?

A. Nothing. Normally—to be very technical about it—the Union, through the Stewards, or the Stewards at Palmolive-Peet technically were violating the agreement, because the agreement, under Section 10, "Adjustment Committee," the first paragraph reads:

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“The employer agrees to recognize the Union system of Department Stewards as the spokesmen and representatives of the employees in the departments from which they are elected.”

I was not in on the beginning of this hierarchy of five Stewards representing the entire plant, but it was raised by myself a few times with the Stewards on the question of representation for departments, and the answer that I received was that it was too awkward to have stewards from each department taking up grievances, and that they as a group were Chief Stewards. In reality there were five Chief Stewards.

I made the comparison at the time between this particular contract and the contracts that we have at Palmolive-Peet, Durkees, or any of the big warehouses or industrial plants where we have anywhere from ten to twenty Department Stewards, and from that group of Stewards an Adjustment Committee or a Grievance Committee is elected to represent all of them, thereby giving everyone in the plant an opportunity to air his grievances to his own particular Steward.

They thought this was wrong, that it could not be done.

To further go on with this, I attended a House Meeting in June of last year, at which time a motion was made that all Stewards be elected automatically,

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the five Stewards. There was some argument about it. The motion was defeated and they were nominated separately and elected as the five Stewards representing all of the workers in that particular plant.

Q. The same section of the contract, Section 10, sets up certain machinery for the adjustment of grievances. Do you know whether the Stewards that are defendants in this case utilize that machinery?

A. No. I don't think so, because I know for a fact that there are grievances, or have been grievances that were not satisfactorily reached or concluded, for the reason that they did not follow out the particular contract.

In Paragraph 3 of Section 10 it states:

"If the Department Steward is unable to reach a satisfactory settlement with the foremen, he shall report the matter to one of the Chief Stewards, who in turn will take the matter up with the Superintendent or other authority designated by the Employer. If the Chief Steward does not reach a satisfactory settlement of the grievance, it shall be turned over to the Adjustment Committee for settlement. In case the Employer shall employ an industrial labor relations manager, he shall be consulted in lieu of the Superintendent."

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(Testimony of Charles Duarte.)

It was impossible, practically impossible for the five Stewards, or so-called "Chief Stewards," to follow out the letter of the agreement, because no Department Steward was ever consulted, for the simple reason there were no Department Stewards who could take the arguments in. They met in meetings with the Employer, they sat down, concluding nothing, and I made the statement at one of the meetings that I would refuse to attend a meeting of a committee consisting of five Stewards who were supposed to adjust grievances, where they did not adjust grievances.

The contract as such was never followed out under Section 10 providing for Department Stewards, and the procedure for taking up of grievances and the steps into arbitration, if necessary, if they could not be settled by the Adjustment Committee.

Q. Section 10 also calls for the selection of a Chief Stewards. Did the Stewards at Peet's ever do anything about that?

A. No. The reason for it was, I believe, that none of the five Stewards wanted to trust any of the others, and they simply stated that, "We are all Stewards. We are all Chief Stewards. There will be no one Chief Steward, and we will all be called in on all grievances."

Q. What sort of judgment did the Defendant Stewards use in taking up grievances? That is, did

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they present many phony beefs? Can you give any examples of the type of grievances that were taken up?

A. Well, there were many—what we call “phony grievances”, grievances that had no place before the Management, that could have been settled within the department itself, grievances relative to the question of how many men were working on the job, that could have been settled in consultation with the departments or the people within the departments.

The only comparison I can make, as an official of the Union, is to make a comparison of what happens in some of our other houses where Department Stewards within the department settle the petty grievances within that department, and the Chief Steward in any of these houses is only called in as a last resort before calling in a Business Agent, if he cannot settle the problem.

They went through a whole series of double talk at these meetings, that resulted in nothing concrete for the benefit of the workers involved.

Q. Brother Duarte, you are familiar with the Constitution of Warehouse Union, Local 6?

A. I am.

Q. Does that Constitution provide a means whereby officials of the Union can be brought up on charges of misconduct? A. It does.

A. Did any of the nine Defendants in this case,

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to your knowledge, ever bring charges under the Union Constitution against any official of this Union?

A. None of the Defendants ever brought charges, written charges under the Constitution as provided for, or ever brought verbal charges. By that I mean, ever took the floor at a Union meeting in charging the officers with malfeasance of office, et cetera. They had a right, under our Constitution, to bring written charges, and had the God given right to get up on the floor of our Union meeting and point out, if they had any charges to make, point out the actions of the officers before the entire membership. Neither one of these steps were taken by any one of these Defendants.

Mr. Heide: That is all the questions of this witness.

Chairman Wilson: That is all the questions?

(Witness excused.)

Chairman Wilson: Mr. Heide, will you call your next witness?

Mr. Heide: Pardon?

Chairman Wilson: Will you call your next witness?

Mr. Heide: If there are no questions of the witness from the defense (and I assume there is none), the defense not being here represented, I will call as the next witness Louis Gonick.

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LOUIS GONICK

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heide:

Q. Will you state your name, your book number and your position with the Union?

A. My name is Louis Gonick, Book No. 0-2343, Business Agent for the Warehouse Union.

Q. Do you know Haynes, Luchsinger, Marshall, Moreau and Smith, former Stewards at Peet's?

A. I do.

Q. How did you come to know them?

A. I came to know them in my capacity as Business Agent, taking up grievances in negotiations with the Company.

Q. Calling your attention to the last of May and the first of June of 1945, did you ask the Stewards to arrange for a meeting of the employees at Peet's?

A. I did.

Q. What was the purpose of the meeting?

A. Well, the purpose of the meeting was to elect new Stewards, or at least to have an election of Stewards to discuss the contract and the negotiations which were there in progress, and to take up any grievances that were in the plant, that usually come out at a House Meeting.

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Q. On how many different occasions did you ask the Stewards to arrange for such a meeting?

A. I asked them on three different occasions.

Q. What did they ever do about your request?

A. They did not do anything. As a matter of fact, they prevented the Union from calling a meeting. On the first occasion—that was the latter part of May, I approached the Stewards and called their attention to the fact that a House Meeting was due, the last House Meeting having been held about a year before. They asked me what we needed a House Meeting for, and I told them for the reasons I have described, for discussion of negotiations and grievances and election of Stewards. They did not warm up to the idea at all, particularly Marshall and Smith and Haynes, and they stated that there was no need to have a meeting, there were no grievances, everybody was happy and there would be no purpose served in calling a House Meeting.

I called their attention to the fact that the Company had made certain offers in connection with negotiations, and they stated there too that it would not be necessary to have a House Meeting for that, to gain the approval of the membership. All that was necessary was to go around to the various individuals involved, say on the shift differentials, and the women's pay, and ask them if they approved.

I told them that this was no way—that in a matter of this sort the whole house has to have a dis-

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cussion on it, and either accept or reject the proposals, and Marshall told me that that was unnecessary, that the men would be satisfied with anything that they got, and there was no need to discuss it any further.

However, I still persisted and stated we should have a House Meeting, and they said, "Well, we will discuss it further."

Q. Did you ever furnish the Stewards with a notice of meeting, and ask them to post it?

A. Yes, I did that, too.

Q. What did they do about it?

A. Well, they never posted it, but, preceding that meeting, that is about two weeks after my first approach to them, I asked them again whether they had thought the thing over, and whether they would have a meeting, and they said, "Well, maybe."

So, I asked them again. I asked them whether they would get the hall, rent the hall and make all the arrangements. They said that they would.

About two weeks later I came back again. I said, "Have you made the arrangements?" They informed me that they had forgotten all about it.

So, at that point I informed them that I would make the arrangements—that the Union would make the arrangements themselves, and asked them what they thought would be a satisfactory time to have a meeting.

So, they informed me that it would be impossible

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to have a meeting without three weeks' notice. I thought this was rather strange, because we frequently call House Meetings on 48-hour notice. They told me that it would take at least three weeks to inform the members in the plant about a meeting. However, the arrangements were made to rent the hall on University Avenue, the Finnish Hall, and a notice was given them for posting.

I asked them whether they would post the notices. They said they would. I gave the notices to Marshall. Two of the other Stewards were present. I went around in the plant, came back again and asked each Steward, I said, "You know you have your notices for a meeting. You will see that they are posted."

They informed me that they would see that they were posted.

The notices were never posted.

Q. Calling your attention to July 30 of 1945, did the Stewards call a meeting on that date?

A. A meeting was called—that is Monday, isn't it? There was a meeting called for another group that was organizing.

Q. Let me ask you this question. If I understand your answer, a meeting was called by the Stewards, is that correct, on that day, and if so, was that meeting authorized by the Union?

A. No, there was no—there was a meeting called that was not authorized by the Union.

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(Testimony of Louis Gonick.)

Q. Did the Stewards post notices of that meeting? A. Yes, they did.

Q. I hand you a paper and ask you if this is one of the notices posted.

A. (After examining): Yes. That is the notice.

Mr. Heide: I would like to introduce this as the Prosecution's Exhibit No. 4.

Chairman Wilson: It will be received.

(Copy of notice of meeting was received in evidence and marked Plaintiff's Exhibit No. 4.)

The Witness: In connection with this notice, this notice was posted on Saturday afternoon, calling for a meeting, I believe on Monday, which was far less than the three weeks that it was necessary to notify members.

Q. (By Mr. Heide): In other words, it did not require three weeks in this case to notify the employees in advance of a meeting?

A. That's correct.

Q. Do you recall when the Stewards Council meetings were changed and the Stewards Council was amalgamated with the Executive Board and became the Executive Council of the Union?

A. I recall the occasion. I don't recall the exact date at the moment.

Q. Were Stewards under a duty to attend those meetings? A. They were.

Q. That is, either of the Stewards Council or the Executive Council, as it is now constituted?

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(Testimony of Louis Gonick.)

A. That's correct.

Q. Did the Stewards at Peet's, the former Stewards at Peet's who are Defendants in this case attend the meetings of the Executive Council?

A. At the beginning Marshall attended, and Smith. Marshall was elected as the Chairman, and Smith as the Secretary. They went to one or two meetings, and then they failed to come any more.

Q. Was their attendance necessary to the efficient and proper discharge of their duties as Stewards?

A. Yes, it was. The Stewards Council meeting is the one place where the Stewards get together with the Executive Board, discuss and determine policies and provide means for carrying them out. Unless they attend the Stewards Council meetings, they are in effect divorced from the Union and the Union policy, to a large degree, particularly with these Stewards who neither attended the Council meetings or the membership meetings.

Q. When you refer to these Stewards Council meetings, you mean the combined meetings of the Executive Board and Stewards Council, which is called in the Union the "Executive Council"?

A. That's correct.

Q. What was the practice of the former Stewards at Peet's in regards to attending general membership meetings of the Union?

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A. Well, none of the Stewards or—pardon me, will you repeat that question again?

Q. What was the practice of the Stewards at Peet's who are Defendants in this case in regard to attending the general membership meetings of the Local Union?

A. All the Stewards but one have not been to a membership meeting for many months. They had obtained excuses for themselves for not attending these meetings. Of course, they were authorized also to issue excuses to others. However, they themselves did not go, with the exception of one.

Q. Are you familiar with a grievance that came up at the Colgate-Palmolive Company plant involving a Negro member of the Union named Ulysses Norman, and a white member named Andy Nigro?

A. I am.

Q. Did the Defendants, Frank Marshall and William Sherman, have anything to do with that particular case?

A. They did.

Q. What was their part in that case?

A. Well, I will have to outline the whole thing, more or less.

In 19—at least, this last year, a Negro member was in the dressing room at Peet's when another member came in, a white member, and he stated in the presence of this Negro that, "There are too many Negroes in the Union, and the quicker we get them out of here the better"

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(Testimony of Louis Gonick.)

He did not say "Negro." He said a more derogatory term, and he used other expressions.

The Negro member cited him—cited the white member before the Grievance Committee for having violated the no-discrimination pledge. Frank Marshall and Sherman came to the Grievance Committee to defend the white member, whose name I believe was——

Q. I stated the name. Ulysses Norman was the Negro member. The white member's name was Andy Nigro.

A. Yes. And, their contention there was, when they stated in most positive terms that they had a right to use any language they wanted to, that saying a thing did not constitute discrimination; an overt act was necessary. They brought out Webster's Dictionary to prove that "discrimination" means some overt act, that one could say anything one pleased, no matter what the consequences of that language were.

Q. I ask you, was there a Union rule adopted by vote of the membership that anyone found guilty of expressing race hatred or prejudice because of race, color, creed, sex or political opinion would be subject to a fine not less than \$25?

A. That's correct, and it was brought out on the Union floor many, many times.

Q. When this case was discussed at the Union meeting, the Defendants, Sherman and Marshall,

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also spoke and took approximately the same position they had in the meeting of the Grievance Committee?

A. They took the same position, yes.

Q. You mentioned William Sherman. Was he formerly an officer of this Union?

A. He was.

Q. What position did he hold?

A. Business Agent.

Q. Can you fix any time or occasion after which he commenced to work against the interests of the Union?

A. Well, I would fix January of 1944 as that time. That is when he was defeated for office.

Q. Will you state in your own words what activities or part he took that served to undermine the Union?

A. Well, this is one example of it. I can cite other examples.

They were along the line that the Stewards were taking, refusal to come to the Executive Board meetings after he was elected, certain statements that he made in the General Executive Board which led one to believe that he was an oppositionist, opposing the Union program, because it was enunciated by officials that he did not like. Many of the concrete things, of course, came out later, when we discovered that he was more or less the brain work behind the opposition group at Peet's.

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(Testimony of Louis Gonick.)

Mr. Heide: That is all the questions of this witness.

Chairman Wilson: You may be excused.

(Witness excused.)

Chairman Wilson: Will you call your next witness?

Mr. Heide: The next witness I want to call is Hack Gleichman.

HACK GLEICHMAN

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heide:

Q. Will you state your name, book number and your position with the Union?

A. The last name is Gleichman, G-l-e-i-c-h-m-a-n; Hack, H-a-c-k. Book No. 0-3499. Field Representative, Local 6, Oakland Division.

Q. Are you acquainted with the products manufactured by the Colgate-Palmolive-Peet Company plant in Berkeley? A. I am.

Q. Were they engaged in the manufacture of any war materials on or about the 1st day of August, 1945? A. Yes, they were.

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(Testimony of Hack Gleichman.)

Q. What were those materials?

A. Glycerine.

Q. Did a stoppage of work occur at the plant on or about August 1st? A. It did.

Q. To what extent, if any, was the production of war materials affected by that walkout?

A. Well, I couldn't say exactly how many thousands of gallons of glycerine, but I know it was materially affected, because the Navy was beginning to squawk about the situation.

Q. It stopped the manufacture of glycerine at the plant? A. Glycerine, yes.

Q. How long did this stoppage last?

A. About three days.

Q. Was the walkout authorized by Warehouse Union, Local 6? A. It was not.

Q. What was the policy of Warehouse Union, Local 6 in regard to strikes or stoppages in war-time?

A. Local 6 had a No-Strike pledge which had never been broken during the entire war period.

Q. Did you make any investigation as to who were the leaders in that unauthorized strike?

A. Well, in my work I was in a position to know who was.

Q. Can you name those leaders?

A. Sherman, Lonnberg, Olsen and one more.

Q. You say one more?

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(Testimony of Hack Gleichman.)

A. There were four that I know of in that situation.

Q. Was the other one that you refer to the Defendant Thompson?

A. Thompson, that's correct.

Q. Were you acquainted with the former Stewards, Haynes, Luchsinger, Marshall, Moreau and Smith?

A. I was.

Q. What was their attitude with reference to the Union's program of political action?

A. Well, they were not very enthusiastic about it, because in my activities with them, whenever we asked them to take some concrete step for developing the policy, whether it be on maintaining the price ceilings under OPA or breaking the Little Steel Formula, or going for an increase in wages across the Board, which was our position at the time, they just would not participate.

Q. Do you recall an occasion when the Union asked the Stewards to circulate petitions in the plant for repeal of the Little Steel Formula and for a 20 per cent wage increase?

A. Yes. As a matter of fact, around the time—a couple of weeks before this notice of their special meeting was put up, I remember telling them about this program, because they were talking about improving conditions around there, and I pointed out that our problem was a similar problem to those of our workers all over the area and throughout the

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country, and that what we were trying to do was to break the Little Steel Formula first, then, through the War Labor Board, we would be able to get more money for our people, and as a result of that discussion I said that I would mail to each one of them a few petitions which had just been put out by the National CIO, and that I would mail them to their homes so that they could get them as quickly as possible, and that when I came out there in a few days from then, I would pick them up. Each one I think contained—had room for around twenty signatures. That would mean each one could get about sixty, which would about take care of the plant.

I did that, and when I went back there a few days later, not one of them had done a thing about it. As a matter of fact, one of them, Moreau, said that he thought that this was not what we were supposed to do, that what we were going to do was go for more money, and I explained to him that you could not go for any more money unless you broke the Little Steel Formula, and the attitude of the rest was just that—was just that it was unimportant, so they either left the letters home or tore them up, or something. Petitions, rather; not letters.

Q. Did the former Stewards ever oppose the Union's program in regards to the OPA?

A. Well, their attitude on OPA was right along the same lines of their attitude toward Little

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(Testimony of Hack Gleichman.)

Steel, breaking the Little Steel Formula, expressed at that time that I spoke to them about the petitions. They did not think that the fight that we were making to retain whatever we could of OPA regulations with regard to consumer's goods especially, was anything that we should waste too much time about. As a matter of fact, they said—I don't remember just which one of the five said it—but it was stated that, "Political action is all right, but we do too much of it."

Q. I show you seven papers here, entitled "Progress Report", bearing the dates of August 7, August 13, August 31, September 5, September 8, September 12 and September 15, and ask you if you can identify them.

A. (After examining): I can. These are reports put out by the spokesmen for the AFL Chemical Workers.

Q. The Defendants in this case?

A. Yes. They were taking the leadership in this activity.

Mr. Heide: Mr. Chairman, I would like to introduce these as evidence in this case, as the Prosecution's Exhibits 5A, 5B, 5C, 5D, 5E, 5F and 5G.

Chairman Wilson: Is there any objection? (No response.)

If not, the exhibits may be received in evidence.

(Copies of Progressive Reports dated respectively August 7, 1945, August 13, 1945, August

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(Testimony of Hack Gleichman.)

31, 1945, September 5, 1945, September 8, 1945,
September 12, 1945 and September 15, 1945
were received in evidence and marked Plain-
tiff's Exhibits 5A through 5G respectively.)

Mr. Heide: That is all the questions of this
witness.

(Witness excused.)

Mr. Heide: I would like to call now Chuck
Grube.

CHARLES GRUBE

called as a witness on behalf of the Plaintiff, being
first duly sworn, was examined and testified as
follows:

Direct Examination

By Mr. Heide:

Q. Will you state your name and occupation,
and your book number?

A. My name is Charles Grube, G-r-u-b-e, Book
No. 9-1869, classified as a Foreman at Colgate-
Palmolive-Peet.

Q. Are you acquainted with the strike that took
place at Peet's during the first part of August?

A. Yes, sir.

Q. What effect did the strike have on the Com-
pany's production of materials for the Armed
Forces?

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Before Warehouse Union—(Con't)

(Testimony of Charles Grube.)

A. Well, they kind of cut it down during the war. We was down to zero during the war. We had that war contract to put out, and they lost glycerine that was vital to war products. I say practically a week—we lost practically a week. I can't say a week, but we lost—we had to work overtime to make it up.

Q. You lost considerable production as a result of the strike?

A. That's right, on dynamite glycerine.

Q. Do you know who the ringleaders of this strike were? A. Yes, sir.

Q. Will you name them?

A. Yes, sir. Miller, Sherman, Ed Thompson, Linc Olsen, Frank Marshall, and that is all. That's the ringleaders. They coerced the rest of them into doing it.

Q. Did you attend the rump meeting that was called at the Finnish Brotherhood Hall on July 30, 1945? A. I did.

Q. Who were the leading figures at that meeting?

A. Ed Thompson, Linc Olsen, Harold Lomberg, Bob Ashworth. They was the ringleaders.

Q. Sherman?

A. Sherman was the chairman.

Q. Sherman was the chairman of that meeting?

A. That's right.

Q. Were any charges of misconduct against offi-

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(Testimony of Charles Grube.)

cial's of Warehouse Union, Local 6 made at that meeting?

A. There wasn't—there was—yes, misconduct, but it was mostly stealing was brought up at that time. That comes under misconduct.

Q. Who made the charges?

A. Bill Sherman and Ed Thompson.

Q. What were they?

A. That Heide took money from the PAC and put it in his own pocket for traveling expenses.

Q. When you say "PAC", what do you mean?

A. P.A.C. [37]

Q. What else?

A. What else? Well, they were going to raise the dues in order to make more money for the CIO. The CIO was practically broke, and they was going to raise the dues, and CIO was stealing from one pocket—in other words, Paul was stealing from Paul to pay Simon, or whatever it is. They was just taking from one pocket in the other, to make it up, and we hadn't had a financial statement for the last four months.

Q. Were there any discriminatory statements made concerning the officials or other members of the Union, regarding their political affiliations?

A. Yes. It was claimed that there was no more "Communism" in this Local, that it was "Heideism," that Communism was a thing of the past, and now it was "Heideism", that Sherman was Busi-

Intervener's Exhibit No. 8—Proceedings
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(Testimony of Charles Grube.)

ness Agent of this Local, and that Heide was squawking in the office, and beating down Sherman's throat, that he should listen to his way of thinking. There was no more Communism; it was all "Heideism" from now on. Heide was the big shot.

Q. Was anything said about racketeering on the part of Union officials?

A. Right. They said that you—I mean, Paul Heide, "Chilly" Duarte, was racketeering. Paul Heide was running this Union for his own advantage.

Mr. Heide: That is all the questions of this witness.

Chairman Wilson: Are there any objections?
(No response.)

If not, the witness may be excused.

(Witness excused.)

Mr. Heide: The next witness is Charles Leacock.

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CHARLES W. LEACOCK

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heide:

Q. Will you state your name and your Union——

A. Charles L. Leacock.

Q. ——Union Book number?

A. Union Book No. 0-126.

Q. And your occupation?

A. Maintenance man.

Q. At Colgate-Palmolive-Peet Company?

A. Yes.

Q. Calling your attention to the walkout which occurred at the plant on or about August 1st of this year, were you present the day of that walkout?

A. Yes, I was.

Q. Did you hear anyone agitating for a strike on that day, or prior to the day the strike occurred?

A. Prior to the day of the strike.

Q. Who was it? A. Ed Thompson.

Q. Anyone else?

A. And Marshall, Luchsinger, and "Monroe"—or, Moreau; that's his name.

Q. Stanford Moreau? A. Yes.

Q. Were you present at the rump meeting which

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(Testimony of Charles W. Leacock.)

was called on July 30, 1945, at the Finnish Hall in Berkeley? A. Yes.

Q. Did you hear anyone in that meeting attacking officials of this Union?

A. Absolutely.

Q. Will you state in your own words what was said, as you recall it, and who said it?

A. Sherman was the Chairman, and Mr. Thompson at the time was the spokesman, relieved by Mr. Lonnberg, who stated that the "Heideism" of Local 1-6 was in progress. They accused officials and executives of this Union as racketeers and looting the treasury of Local 1-6. And, I sat there and listened.

Q. Did you hear any "Red-baiting", or remarks about the political affiliations of any of the officials or members of the Union? A. Yes, I did.

Q. Will you state what you heard?

A. In the discussion of the Union that afternoon, which personally I didn't get heads or tails of it, becaues from what I, in my own common knowledge, never had anything to work on, they couldn't finish the sentence, and the gentleman got so exhausted that he had to call for some help, and the officials of this organization and the action of the operation of this Union was hit from stem to stern. In other words, you were doing everything but the right thing.

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(Testimony of Charles W. Leacock.)

Mr. Heide: That is all the questions I have of this witness.

Chairman Wilson: That is all.

(Witness excused.)

Mr. Heide: I would like to call Pauline Goulart.

PAULINE GOULART

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heide:

Q. Will you state your name and Union Book number?

A. Pauline Goulart, G-o-u-l-a-r-t, O-W177, and I am a machine operator at Colgate-Palmolive-Peet.

Q. Calling your attention to the walkout that has been referred to in previous testimony, which occurred on or about the 1st day of August, were you present on the day of that walkout?

A. I was.

Q. Did you hear anyone urging the employees to walk out?

A. Yes. I was operating one of the machines, and Ed Thompson came over to the machines on the whole unit, and told us to shut off our machines.

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(Testimony of Pauline Goulart.)

He just said, "Shut down those machines." He told us that they were having a meeting.

Mr. Heide: That is all.

(Witness excused.)

Mr. Heide: Mr. Chairman, I would like to ask for a recess of five minutes at this time.

Chairman Wilson: If there is no objection, we will recess for five minutes.

(Short recess.)

Chairman Wilson: Come to order, please. We will proceed with the case.

Mr. Prosecutor, do you have any more witnesses?

Mr. Heide: Mr. Chairman, I would like to take this opportunity to point out that we called a number of witnesses, but I do not wish to call them at this time. I think that the case is complete. I would just like to say that we thank them for being present here, and we are sorry that they were troubled to come down here.

We will not call any more witnesses.

Chairman Wilson: Does anybody wish to say anything on behalf of the Defendants? If so, they will have the right to have the floor. (No response)

Mr. Silas Hansen: Mr. Chairman, it strikes me as though the Defendants, the same as any other defendants, have a right to be heard. How we are going to do it, I don't know. However, it looks as though they don't want to be heard. If the ma-

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jority considers it advisable to again attempt to get them together, I think it should be done. However, that might not be the consensus of opinion. That is my personal feeling, that they should be heard, but it is quite obvious that they don't want to be heard.

I think that is about all I can say on that.

Chairman Wilson: Does anyone else have anything to say? (No response)

We will take the case under advisement. Our decision will be presented at the next regular membership meeting, as provided in the Constitution.

At this time I will bring this meeting to a close. The case is now closed.

(Whereupon at 4:00 P.M., Wednesday, October 3, 1945, the hearing in the above-entitled matter was closed.)

INTERVENER'S EXHIBIT No. 9

Before: Warehouse Union, Local 6, International
Longshoremen's & Warehousemen's Union

In the Matter of

WAREHOUSE UNION, LOCAL 6, INTERNATIONAL
LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, CIO,

Plaintiff,

vs.

MANUEL ALEGRE, TERRY ANDERSON,
ROBERT ASHWORTH, TOMMY AZEVEDO,
VINCENT BARBONI, ANN CERRATO,
FELIX DENKOWSKI, HENRY GIANNARELLI,
HENRY HELLBAUM, MARTIN HEPPLER,
GLEN HIXON, WILLIAM HOWARD,
ALDEN LEE, MANUAL MUÑOZ,
KAY NORRIS, INA PAIGE, K. PERIERA,
JOHN PERUCCA, MIKE RAMIEREZ,
CALIXTO RIGO, OPHELIA REYES,
F. L. RICHMOND, ROSE ROS, MANUEL
SOUZA, NICK TATE, GENEVIEVE
YOUNG, ALBERT ZULAICA,

Defendants.

Green Room, Warehouse Union, Local 6,
158 Grand Avenue, Oakland, California

December 17, 1945. 8:30 P.M.

Before Trial Committee:

P. Lind, Chairman.

M. Pavalini.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

Joe Quartarola.

J. Silva.

M. Frietas.

Appearances: On Behalf of the Plaintiff: Charles Duarte, Business Agent, Warehouse Union, Local 6, 158 Grand Avenue, Oakland, California.

Present: Ray Heide, International Representative, International Longshoremen's & Warehousemen's Union.

Emma Stanley, Office Secretary, Warehouse Union, Local 6, I.L.W.U., CIO.

PROCEEDINGS

The Chairman: As the Chairman for the Trial Committee, I will now call the meeting to order.

The first thing we will have to do is to appoint a Sergeant-at-Arms. I will ask Fred Fields to take over.

Will Miss Stanley please act as Clerk for the Trial Committee?

Miss Stanley: Yes, I will.

Mr. Anderson: Mr. Chairman, may I have a word before you get into the trial?

There are some of us here who don't want to stand trial under the present charges. We have prepared a statement which Kay Norris is going to read. There are some of us who want to stand trial tonight. So, those of you who want to stand trial can remain, but after the statement is read, those who don't want to stand trial may leave.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

Mr. Duarte: Mr. Chairman, my name is Charles Duarte, acting as Prosecutor in this case.

I would like to suggest that the people who have a statement to make wait until that order of business which provides for a plea, and at that time have the statement read, with the names of the people that, I suppose, are signed to it. I think that would be the appropriate time to present the statement as such.

Mr. Howard: We want an opportunity to read it before the trial starts.

The Chairman: We will now proceed.

The Clerk will read the Bill of Particulars given to the defendants.

The Clerk: This represents a Bill of Particulars sent to the following people:

Manuel Alegre	Kay Norris
Terry Anderson	Ina Paige
Robert Ashworth	K. Periera
Tommy Azevedo	John Pernucca
Vincent Barboni	Mike Ramierez
Ann Cerrato	Calixto Rigo
Felix Denkowski	Ophelia Reyes
Henry Giannarelli	F. L. Richmond
Henry Hellbaum	Rose Ros
Martin Heppler	Manuel Souza
Glen Hixon	Nick Tate
William Howard	Genevieve Young
Alden Lee	Albert Zulaica
Manuel Munoz	

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

This is dated December 3rd. It reads:

“You are hereby informed that the trial on the charges filed against you, of which you have already been notified, will be held on Monday, December 17, 1945, at 8:00 P.M., in the Green Room at 158 Grand Avenue, Oakland, California.

“In accordance with the request of several of the defendants for a Bill of Particulars, we have consulted the members who filed the charges and hereby advise you that the sole issue at the trial will be your alleged participation in an unauthorized strike in wartime, contrary to the I.L.W.U.'s No-Strike pledge.

“If you wish to plead guilty to this charge and waive trial, you may sign the enclosed ‘Plea of Guilty and Waiver of Trial.’ Under the heading ‘Reasons for exercising leniency in my case’ you may state any reasons which you think excuse or lessen your offense. This information will be taken into consideration by the Trial Committee in determining your case. The enclosed stamped, self-addressed envelope may be used in returning the plea.”

It is signed by Paul Heide, Vice-President.

Attached to this letter is a “Plea of Guilty and Waiver of Trial,” which says:

“Receipt is acknowledged of a copy of the charges filed against me under the constitution

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

and by-laws of Warehouse Union, Local 6, I.L.W.U. I hereby waive trial upon each and all of the said charges and enter a plea of Guilty to the charge of having engaged in an unauthorized strike in wartime, contrary to the I.L.W.U.'s No-Strike pledge. I hereby submit myself to the verdict of the Trial Committee and request that it exercise leniency in my behalf."

Then there is a place for the date and the signature, and "Reasons for Exercising Leniency" in the case of whoever signed the letter.

The Chairman: You have all heard the Bill of Particulars.

I will ask the Clerk to call the names of the Defendants. When your name is called, you will answer "Present," and then state whether you are guilty or not guilty.

The Clerk: Manuel Alegre.

Mr. Alegre: Not Guilty.

The Clerk: Terry Anderson.

Mr. Anderson: Not Guilty.

The Clerk: Robert Ashworth.

Mr. Ashworth: Not Guilty.

The Clerk: Tommy Azevedo.

Mr. Azevedo: Not Guilty.

The Clerk: Vincent Barboni.

Mr. Barboni: Not Guilty.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

The Clerk: Ann Cerrato.

Miss Cerrato: Not Guilty.

The Clerk: Felix Denkowski.

Mr. Denkowski: Not Guilty.

The Clerk: Henry Giannarelli.

Mr. Giannarelli: Not Guilty.

The Clerk: Henry Hellbaum.

Mr. Hellbaum: Present. Not Guilty.

The Clerk: Martin Heppler.

Mr. Heppler: Not Guilty.

The Clerk: Glen Hixon.

Mr. Hixon: Not Guilty.

The Clerk: William Howard.

Mr. Howard: Not Guilty.

The Clerk: Alden Lee.

Mr. Lee: Not Guilty.

The Clerk: Manuel Munoz.

Mr. Munoz: Not Guilty.

The Clerk: Kay Norris.

Miss Norris: Not Guilty.

The Clerk: Ina Paige.

Miss Paige: Not Guilty.

The Clerk: K. Periera.

Mr. Periera: Not Guilty.

The Clerk: John Perucca.

Mr. Perucca: Not Guilty.

The Clerk: Mike Ramierez.

Mr. Ramierez: Not Guilty.

The Clerk: Calixto Rigo.

Intervener's Exhibit No. 9—Proceedings
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Mr. Rigo: Not Guilty.

The Clerk: Ophelia Reyes.

Miss Reyes: Not Guilty.

The Clerk: F. L. Richmond.

Mr. Richmond: Not Guilty.

The Clerk: Rose Ros.

Miss Ros: Not Guilty.

The Clerk: Manuel Souza.

Mr. Souza: Not Guilty.

The Clerk: Nick Tate.

Mr. Tate: Not Guilty.

The Clerk: Genevieve Young.

Miss Young: Not Guilty.

The Clerk: Albert Zulaica.

Mr. Zulaica: Not Guilty.

The Chairman: I want to inform all of the Defendants that they have a right to be represented at this trial by a member of this Union, and only by a member of this Union. If you have such a representative, please state his name and book number for the record.

Do you have anybody you want to represent you at this trial?

Mr. Anderson: We can't understand you.

Voices: No. No. Explain yourself.

The Chairman: I want to inform all of the Defendants that they have a right to be represented at this trial by a member of this Union, and only by a member of this Union.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

Miss Norris: We cannot understand him.

Mr. Howard: You have a right to be defended by a member of the CIO, if you will state his name and book number.

Miss Norris: I can't understand him.

Mr. Duarte: Mr. Chairman, may I ask that the Court Reporter read back the statement that the Chairman made?

(Record read.)

Miss Norris: Thank you.

The Chairman: The Prosecutor will now proceed with the case.

Mr. Howard: Mr. Chairman, may we present our statement now? We are all through with the business part of this trial, I guess.

Mr. Duarte: We have no objection.

The Chairman: It is up to the Prosecutor to call for the first witness.

Mr. Duarte: We have no objection to your introducing a statement, if you wish to do so, on behalf of some of the people.

Miss Norris: "We are appearing here only for the purpose of protesting against and taking exception to the trial of whatever charges may have been preferred for the following reasons:

"1. We have never received a copy of the charges, if any, upon which this trial is to be held, as required by Section 7, Article XV of the Constitution and By-Laws. The first so-called notice sent

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

out consisted only of a letter from the vice-president, stating that charges had been filed. No copy of the charges was enclosed.

“The next so-called notice was again a letter from the vice-president, which likewise did not enclose a copy of any charges. The only reference to the nature of any charges contained in the second letter was a paragraph which stated the nature of the ‘issue’ as a matter entirely different from that indicated in the previous letter. The second letter, likewise, failed to specify the Section of the Constitution, Declaration of Principles, or By-Laws alleged to have been violated. Not having seen the charges, we are unable to state whether the charges specify the Section alleged to have been violated. They are, therefore, invalid and void since they do not comply with Section 4, Article XV, of the Constitution and By-Laws.

“2. We understand, and so state, that Section 6, Article XV of the Constitution and By-Laws, requiring a Trial Committee to be selected at the next regular meeting following the filing of the charges, has not been complied with.

“3. We maintain that these proceedings are wholly illegal and void for the further reason that they were not instituted, and are not being carried through, in good faith and are unfair and prejudicial, in that only a few of the men who could be made the subject of similar alleged charges have

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

been called to stand trial, and that this attempted trial is not in fact one upon the charges alleged to have been filed, but is being called for some other and unspecified reason, namely, to unfairly and illegally discriminate against and persecute certain members of this union who have acted no differently than the great majority of the other members of the union.

“4. We hereby request that a copy of whatever charges may have been filed be sent to the accused, as required by the Constitution and By-Laws, that the trial thereon be held no sooner than ten days after the charges are mailed, that all the other provisions of the Constitution and By-Laws having reference to these matters be complied with, and that the trial, if any, to be held on such charges be held in good faith, that all members who were guilty of the acts complained of be charged and brought to trial, and that discrimination, prejudice, undemocratic dictatorship and illegality be eliminated from these proceedings.

“Until this is done, we protest against and take exception to the holding of a trial, and we decline and refuse to stand trial.”

Mr. Howard: For those of you who don't want to stand trial, don't think you should stand trial, I think we can be excused now, and those who want to remain for the trial may remain.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

Mr. Duarte: I would just like to ask one question, if I might.

I would like to know the people that introduced this. I note that in the statement it says "I am," and then, in parentheses, "(we are)."

What was the Sister's name? Kay what?

The Clerk: Norris.

Mr. Duarte: Kay Norris.

I would like to know whether Kay Norris was speaking for herself or for anyone else, because she read the statement in the plural sense when she said "we are." There is no signature attached to the document.

Miss Norris: Well, "Chile," I think it was for all of us. I believe it is for all of us. I was just asked to read it. I believe it is for all of us.

Mr. Howard: There are some of us who don't want to stand trial. If anyone here wants to stand trial, that is their own business, not mine. But, I for one am going to wait for further charges. I don't think I should discuss that any more right now.

Mr. Duarte: Mr. Chairman, the Prosecution will prove that charges were sent, return receipts were received, and the Constitution lived up to. If the people who have not signed this statement do not wish to stand trial, they have the right to say they will not stand trial. But, I want to point out that

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)
under the Constitution, refusal to stand trial under Section 11 of Article XV reads:

"If the accused fails to appear for trial without an excuse that satisfies the Trial Committee, such failure to appear may be considered by the Committee as a conclusive proof of guilt."

That is the end of Section 11.

Mr. Howard: We have appeared, but we do not mean to stand trial, "Chile."

Mr. Anderson: We have appeared.

Mr. Duarte: If there is no objection, Mr. Chairman, we will proceed with the trial.

Miss Norris: I would like to hear what you people have to say, but yet I don't feel that I want to stand this trial, because I am not guilty. I don't feel that I am.

Mr. Duarte: I want to make two points, Mr. Chairman, (1) that Sister Norris, who just spoke, made a statement that appears in the record, and (2) the last paragraph of the statement reads: "Until this is done, I protest against and take exception to the holding of a trial, and I decline and refuse to stand trial."

I cannot for the life of me imagine anyone making a statement, saying "I refuse to stand trial," and acting as spokesman for a group of people who leave, while the person that read the statement remains.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

I suggest that if the Sister does not wish to stand trial, the Sister be excused.

(Whereupon, certain of the Defendants left the room.)

Mr. Ashworth: I came down because I don't feel that I am guilty of the charges filed against me, and I would like to stand trial, myself. That is what I came for.

Mr. Duarte: Mr. Chairman, I want the record to show that an unsigned statement was read by Defendant Kay Norris, and that, following the statement, certain verbal statements were made.

I want to emphasize once again for the record that the statement introduced is not signed by anyone who left the meeting.

The Chairman: I believe it will be best for us to take a roll call of the people remaining.

The Clerk: Would you stand up and give your name?

Mr. Heppler: Martin Heppler.

Mr. Hixon: Glen Hixon.

Mr. Azevedo: Tommy Azevedo.

Mr. Zulaica: Albert Zulaica.

Mr. Souza: Manuel Souza.

Mr. Periera: K. Periera.

Mr. Ashworth: Robert Ashworth.

Mr. Denkowski: Felix Denkowski.

Mr. Barboni: Vincent Barboni.

Mr. Rigo: Calixto Rigo.

Intervener's Exhibit No. 9—Proceedings
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Mr. Lee: Alden Lee.

Mr. Perucca: John Perucca.

Mr. Munoz: Manuel Munoz.

Miss Cerrato: Ann Cerrato.

Miss Ros: Rose Ros.

Miss Paige: Ina Paige.

Mr. Tate: Nick Tate.

The Chairman: Would you people mind moving up closer? It is easier for everybody to understand.

The Prosecutor will now call the first witness.

Mr. Duarte: I will call Emma Stanley.

EMMA STANLEY

called as a witness by and on behalf of the Plaintiff, was examined and testified as follows:

Direct Examination

By Mr. Duarte:

Q. Give your name.

A. Emma Stanley, E-m-m-a S-t-a-n-l-e-y.

Q. How old are you? A. 35.

Q. What is your occupation?

A. Office worker.

Q. Where do you work?

A. Warehouse Union, Local 6, I.L.W.U., Oakland Division.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Emma Stanley.)

Q. Did you mail the original charges that were sent to the 26 people who are defendants here?

A. Yes, I did.

Q. Do you recognize this list of names?

A. Yes, I do.

Q. When did you mail them?

A. I have the records here. May I refer to them? (After consulting documents) August 30th and September 1st. There were two different dates on those letters.

Q. How did you mail them?

A. By registered mail.

Q. To whom did you mail them?

A. To the parties involved, suspended members.

Q. Will you read off their names?

A. Yes. Henry Hellbaum, Calixto Rigo, Tommy Azevedo, Manuel Munoz, Robert Ashworth.

Mr. Ashworth: The first charges I got was through a registered letter. They mailed all the rest of them, I believe, to the wrong address. The first one I got was last week, and I went to the Post Office and picked it up.

The Witness: I have the returns.

A. (Continuing) Nick Tate, Manuel Souza, Bill Howard, Felix Denkowski, Manuel Alegre, K. Periera, Vincent Barboni, Glen Hixon, Alden Lee, Ross Ros, Albert Zulaica, Terry Anderson, Genevieve Young, Ina M. Paige, Kay Norris, Ann

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Emma Stanley.)

Cerrato, Henry Giannarelli, Ophelia Reyes, Martin Heppler, F. L. Richmond.

Q. Did you receive return receipts?

A. Yes, I did.

Q. From whom?

A. May I say that—every one with the exception of three.

Q. Will you name the exceptions?

A. Albert Zulaica, Robert Ashworth and Henry Hellbaum.

Q. Did you also mail out the Bills of Particulars? A. Yes, I did.

Q. When? A. December 3rd.

Q. How did you mail them?

A. Registered mail.

Q. To whom?

A. Manuel Alegre, Terry Anderson, Robert Ashworth, Tommy Azevedo, Vincent Barboni, Ann Cerrato, Felix Denkowski, Henry Giannarelli, Henry Hellbaum, Martin Heppler, Glen Hixon, William Howard, Alden Lee, Manuel Munoz, Kay Norris, Ina Paige, K. Periera, John Perucca, Mike Ramierez, Calixto Rigo, Ophelia Reyes, F. L. Richmond, Rose Ros, Manuel Souza, Nick Tate, Genieve Young, Albert Zulaica.

Q. Did you receive return receipts for these?

A. Yes, I did.

Q. From whom?

A. I will have to read them. Kay Norris, K.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Emma Stanley.)

Periera, Thomas Azevedo, Manuel Munoz, Nick Tate, Felix Denkowski, Vincent Barboni.

There is one I can't read.

Ina M. Paige, Alden Lee, Henry Giannarelli, Ann Cerrato, John Perucca, Henry Hellbaum, F. L. Richmond, Manuel Souza, Ophelia Reyes, William Howard, Glen Hixon, Albert Zulaica, Calixto Rigo, Mike Ramierez, Rose Ros, Martin Heppler.

Q. Were there any you did not receive return receipts from?

A. I did not check this. There was a return on this letter from Calixto Rigo, Genevieve Young and Terry Anderson. Calixto Rigo sent a letter with his return. Genevieve Young's was returned. It does not say why.

"Unclaimed." Excuse me.

Q. May I have a copy of the original charges?

A. You are referring to the original ones?

Mr. Duarte: Yes.

(Witness hands documents to counsel.)

Mr. Duarte: Mr. Chairman, as Exhibit A I will introduce the original charges with the return receipts.

The Chairman: They will be received in evidence and marked Exhibit A.

(Copies of original charges and return receipts were received in evidence and marked Exhibit A.)

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)
(Testimony of Louis Gonick.)

Direct Examination

By Mr. Duarte:

Q. State your name, please.

A. My name is Louis Gonick.

Q. You are an officer of Local 6?

A. Yes. I am the Business Agent for I.L.W.U.,
Local 6, the Oakland unit.

Q. Are you familiar with the Union's position
in regard to strikes in war time?

A. Yes, I am.

Q. What was the position of the Union?

A. The position of the Union was that there
would be no strikes during the war for any reason
whatsoever. The position further was that we were
all out for production to win the war. Penalties
were imposed for absenteeism. Any group of work-
ers outside of our Union that went out on strike
were severely and publicly censored, because we
realized that if any group of workers, particularly
in our Union, walked out, it would set a precedent
for a great many others in our Union in plants
that had accumulated grievances during the war,
which had to wait.

Q. What was the record of the Union locally in
regard to strikes during the war?

A. The Union locally had a 100 per cent record
as far as strikes were concerned, that is, up to the
time that Colgate-Palmolive-Peet walked out.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

Q. What was the record of the Union nationally?

A. It was the same. There were no strikes whatsoever. This is the only strike on our record.

Q. I show you a page out of a newspaper, "The Dispatcher," dated July 13, 1945, and ask you if you recognize that as an official newspaper of the I.L.W.U.

A. Yes, that is correct.

Q. On that page is a resolution dealing with the war effort. I ask that you read Point 1 in the upper lefthand corner of that particular page.

A. "We therefore resolve:

"(1) That we reaffirm our war time No-Strike pledge. The war in the Pacific comes first. The fighting men must receive their weapons and supplies without stint, without interruption or delays of any kind."

Q. I ask you to read now the section in the center of the page, the statement. Will you read the heading, please?

A. It is headed, "A Pledge to President Harry S. Truman and the Nation."

"On behalf of the entire membership of the International Longshoremen's & Warehousemen's Union, we renew and give to President Harry S. Truman and the Nation our solemn pledge that until the war is ended with the unconditional surrender of Japan we will not strike, stop work, or cease or slow production for any reason whatsoever.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

"We reiterate that this is an unconditional pledge, given in the knowledge that our first duty is to our Nation and that, despite provocation, we must take no action that will imperil our Nation or cause the prolongation of the war or cause the unnecessary loss of so much as one Allied life.

"We further make the positive pledge that we will do everything in our power to shorten the war by lending ourselves to intelligent solution of the manifold manpower problems and to the development of all possible means to speed production."

This was adopted unanimously on June 29, 1945, by the I.L.W.U. Executive Board.

Q. Following the meeting of the International Executive Board, was a Resolution No. 1, headed "War Effort," concurred in by the Oakland unit of Local 6?

A. That's correct. It was, on more than one occasion.

Q. Did a strike take place at Colgate-Palmolive-Peet on August 1, 1945? A. Yes, it did.

Q. How long did it last?

A. Approximately three days.

Q. Was that strike authorized by the Union?

A. It was not.

Q. Did the Union attempt to get the strikers back to work?

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

A. Yes, they did. On the day of the strike we publicized a meeting outside of the gate, at which some of the people that were on strike attended, and after that meeting they returned back to work.

We also attempted to get the people on strike to come to our meeting, to come to the hall and explain their position so we could try to influence them. None of them showed up.

At their own meetings we attempted to gain admittance by sending our Local President to the meeting, and also the International Secretary-Treasurer. They were not permitted entrance into the meeting, and they were kept outside.

The Conciliation Department also was in on the scene and informed us that they, too, tried to get admittance, but were not permitted into the meeting.

Q. Were there any war materials then being produced at Peet's? A. Yes.

Q. What were they? A. Glycerine.

Q. Was the production of this glycerine interrupted by the strike?

A. The glycerine plant was completely shut down. The glycerine went out to the war effort.

Q. Did the United States Army and Navy interfere in any way?

A. They were in on the picture, and called the Union to try to get a settlement of the strike.

Q. Do you mean by "settlement," get the people back to work?

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

A. Get the people back to work, that's right.

Q. Was the Union notified that there was going to be a strike at Peet's? A. No.

Q. When the strike was called, did anyone notify the Union that a strike had been called?

A. No, there was no notification whatsoever.

Mr. Duarte: Mr. Chairman, I would like to introduce in evidence page 8 of "The Dispatcher," the official newspaper of the International Longshoremen's & Warehousemen's Union, as Exhibit F.

The Chairman: It will be received in evidence and marked Exhibit F.

(Copy of page referred to from "The Dispatcher," dated July 13, 1945, was received in evidence and marked Exhibit F.)

Mr. Duarte: Are there any questions?

The Chairman: I wonder if this group of people from Palmolive-Peet have somebody they want to select as chairman for the defense of their own case?

Does anyone want to come up and cross examine the witness?

Mr. Heppler: I would like to ask him a question.

Cross Examination

By Mr. Heppler:

Q. How many, approximately, went out on that strike?

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

Mr. Duarte: Mr. Chairman, I object to this.

Mr. Heppler: I just wanted to ask a question.

Mr. Duarte: The objection I raise is that if we are going to call witnesses—and I intend to call a few—and each individual person here rises to ask questions, we will be here until next Wednesday sometime, or adjourn and meet nightly.

I would suggest that one person represent the group and ask any questions and conduct any cross examination you see fit.

Mr. Denkowski: I don't want to ask anyone any questions, but you made a statement that is not correct.

Mr. Duarte: I want to raise an objection again, Mr. Chairman. The group should get someone to represent them. I don't want it to seem that I am trying to cut anybody off. I have no objection to anybody asking questions if there is no cross fire. Under those circumstances, I have no objection to anyone asking any particular question.

The Chairman: That is all right.

Mr. Heppler: I would like to ask a question.

Q. (By Mr. Heppler): Approximately how many went out on this strike?

A. Oh, I don't know the exact number. I imagine it was well over half the plant.

Mr. Souza: 223.

Mr. Perrucca: I would like to ask a question.

Q. (By Mr. Perrucca): I was told that there

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

was another strike or work stoppage during the war in a dried fruit plant up in San Jose, to win a point of some kind. Is that true? I think Lynden called them out, or something like that. Is that right?

A. I don't know. I believe that was after hostilities had ceased.

Mr. Perucca: I don't remember the date, but I was told that work was called off during the war up there, to win a certain point of some kind.

The Chairman: Does anyone else want to ask any questions?

Q. (By Mr. Denkowski): You said we went on strike for three days. Did we go on strike for three days?

A. Well, as I recall it, approximately three days. It may have been two and a half days, or between two and a half and three.

Mr. Denkowski: Well, it couldn't be three, because I was called—I didn't know a thing about it—I was called at 11:00 o'clock, and the foreman told me to shut down, because I was blowing soap—to shut down at noon, when we went out at noon, so it must be two and a half days.

The Witness: Well, it may have been two and a half days. I said approximately three days. I remember there were three days in which the workers had walked out. I imagine that even after they

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

came back it took a certain number of hours to start things going, and start the glycerine plant going.

Mr. Denkowski: Well, the glycerine plant was going right along.

Mr. Duarte: Mr. Chairman, I object to this running dialogue that goes on. I think a question should be asked, because we could go on and ask Gonick a million questions, and build something up.

Mr. Frietas: Brother Chairman, may I ask this question?

Why did these people go out on strike? That is what I want to know.

Mr. Ashworth: Brother Chairman, can I speak for myself?

Mr. Frietas: Go ahead.

Mr. Ashworth: I think the biggest majority of the kids sitting here, including myself, didn't understand just what it was all about. The meeting was called. I think approximately 300 people attended that meeting. I, for one, got up on the floor. I told the kids, "Go back to work."

For two days, I think, we were out, and we all went back. Maybe a few stayed out. I wouldn't say that every one of them went back.

Then the kids in my department wanted me as a temporary Shop Steward. The other one was off the job. I think Mr. Gonick here can verify my statement. Once there isn't a Shop Steward in some of those departments, they kind of go haywire.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

While I am talking, I might say something else.

For a year and a half around there, when we held meetings with the Company, there used to be a bulletin of the minutes put on the board at all times. Every member of our Union could go around and read them, see what the meeting was about.

I will have to make this statement, that for the last year and a half out there, there haven't been any bulletins on the board. No one knew what the meetings were about, what they were called for. If you came out there, the only time we knew you were there was when you came out to collect dues, and we handed them to you.

Mr. Duarte: Mr. Chairman, I want to make one objection here, the same objection I will keep making.

The issue before the Committee is not, Why? but, "Was there a strike?" That is what we are trying to prove. Was there or was there not a strike?

Mr. Ashworth: That is what I am asking. You interrupted there, but I will start over again.

That went on for a year and a half. I don't think any of the kids sitting in here actually knew what the score was. Maybe there was a few them, but they was yanked off their jobs here, including myself. I am sure I did not know what the score was, or what it was for. But, I do know that when anything come up, and we asked for a Business Agent to come out there, we was told—I won't mention

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

any names—me, for one, I know I was told a half a dozen times that the Business Agent wasn't in, couldn't be gotten ahold of.

Mr. Duarte: Mr. Chairman, I want to object again on the basis that this kind of discussion relates to the proof that was given in another trial that was held. Those records can be examined by the Committee. The thing we have before us here is not, What was wrong at Peet's? The issue we have here is whether or not these people went on strike. They are charged with going on strike. Period. That is all. Now, did they or did they not walk out on strike? That is the only question we have to discuss here.

The Chairman: That is right.

Mr. Ashworth: Brother Chairman, may I suggest something?

If we are charged with walking out on strike, how about the other 200 that walked out at the same time?

Mr. Duarte: I want to make a point again, Mr. Chairman, that these people are charged with going out on strike.

Mr. Frietas: During the war.

Mr. Duarte: During the war. If three people, three distinct people, murder their grandmother, and two of them are charged with murder and the third is not, that does not give the two the right to

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

say, "I am not guilty because you are not trying a third man."

What we have here to determine is whether or not these people were implicated in a strike. I will keep saying that that is the only charge against them, and that is the only charge we have here.

I think the answer would be, whether or not these people went out on strike. I will object to anyone getting up and making long statements about the history of negotiations, or anything else. I think we should have an answer on whether or not there was a strike at Peet's, and whether or not they went out on strike at Peet's for two and a half days.

Mr. Ashworth: Brother Duarte, I believe I am going to answer the question you just asked, for myself, personally. If that is what you call "walking out on a strike," yes, I attended the meeting personally, myself. I did. But, I did go back to work at the same time the rest of them did, and I never went off the job afterwards. I tried to see that everything went on just as it had been for years. In fact, I helped organize the place in the first place, so I understood the Union very well as far as keeping things in line. I did not do anything against the contract at Colgate's.

As far as trying to be a temporary Shop Steward, if any of the kids had any beef, I went to the boss with it and seen that they stood up to the I.L.W.U. contract; not any other.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

I was yanked off the job one morning when I come in to work thirty, thirty-five days later, handed my suspension papers, and that is all I knew. That is all I have to say.

Mr. Azevedo: His question was, Why did we go out on a strike at Colgate-Palmolive-Peet's?

Is that right?

Mr. Duarte: The question I asked, and I will ask the Chairman to make a ruling on it, is:

Did you or did you not go on strike?

Mr. Azevedo: The question was, Why did we go out on a strike?

Mr. Duarte: I say again, that question, that was asked by a member of the Board, is out of order, because we are here to determine, Was there a strike at Palmolive-Peet's? Did the people here who are defendants walk out on that strike? Were they involved in that strike? That is the question we have to decide here. That is the only question we are here to decide. That is the only charge the people have against them.

I ask the Chairman to make a ruling that the discussion be confined to, Was there a strike? Were these people involved in a strike?

The Chairman: Very well. I make that ruling. Everything that comes up from now on has to pertain to whether you went out on a strike or you did not.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Louis Gonick.)

Are there any more that want to question the witness on the stand?

Mr. Perucca: There is a fellow here who was on a vacation at that time.

Mr. Rigo: I wasn't on the job when the strike took place. I was ten days away. I only read about the strike in the papers. When I came back the strike was over. The strike was called the first of August.

Mr. Duarte: What day did you go on your vacation?

Mr. Rigo: July 23rd.

The Clerk: He might refer to Exhibit E.

Mr. Duarte: It is covered under Exhibit E.

The Clerk: I would like to present this to you.

In the case of these two names, the charges were changed.

Mr. Duarte: Before we go into this, if you are through with Louis, we can excuse him, and then have each one of the people here present their arguments, if they like.

Are there any more questions anyone wants to ask Louis?

(No response.)

(Witness excused.)

Mr. Duarte: Everybody will have a chance to speak their piece.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

Under Exhibit E, the letter states:

“Correcting the Bill of Particulars furnished you by letter dated December 3, 1945, you are hereby notified that the sole issue in your trial will be your fomenting and encouraging a war time strike at Colgate Palm-Olive Peet Company in violation of the I.L.W.U.'s No-Strike pledge.”

The same applies to Manuel Alegre.

Mr. Rigo: I have worked at Peet's for eighteen years, and I have not heard at all about a strike going on there. They never talked about the strike at all. I believe when these people went out for meetings, as they say, it was because the officials of the Union pulled out those nine men. That is the only reason. Therefore, I don't see how I could promote or encourage a strike.

Mr. Duarte: I would like to suggest, Mr. Chairman, that any of the Defendants that want to take the stand can do so on their own, but I would like to call a couple of more witnesses now.

I would like to suggest, as an order of procedure, that I be allowed to call the witnesses, and then any of the Defendants that wish to take the stand and make a statement on their own behalf, or correct any of the things that the witnesses may state, they will then be given the right to do that. I think that will be an orderly procedure. I will

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

present the witnesses for the prosecution, and then allow any and all of the Defendants to take the stand here and make a statement in their own behalf.

At this time I would like to call Brother Hack Gleichman.

HACK GLEICHMAN

called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Witness: Hack Gleichman, G-l-e-i-c-h-m-a-n, H-a-c-k, Field Representative of Local 6.

Q. (By Mr. Duarte): Your book number?

A. 0-3499.

Q. I would like to ask you, Brother Gleichman, as a Field Representative of Local 6, what are your duties?

A. My duties are to assist the Business Agent in whatever work is necessary for me to keep the day to day work running smoothly, to work with the Shop Stewards in the various plants and to carry out the program of the Union generally.

Q. Were you working in that capacity on or about August 1st? A. I was.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Hack Gleichman.)

Q. Did a stoppage of work or a strike occur at Colgate Palm-Olive Peet's on August 1st?

A. It did.

Q. Can you tell us what you know of that particular situation that day, what time the strike occurred, how many people were involved, et cetera?

A. Well, as I recall, those that went out on strike did not return after the lunch hour on that date.

Q. Did you attend a meeting at 4:00 o'clock on Saturday at the gates of the Palm-Olive Peet Company?

A. I did.

Q. Did you speak at that meeting?

A. I spoke at that meeting.

Q. Did any of the people who walked out at noon that day go back to work the following day?

A. Yes, they did.

Q. Did you see any of the Defendants go out on strike that day, or urge any of the workers to join the strike?

A. Well, I saw all the Defendants in my activities, because I had been working at the plant assisting Brother Gonick for many weeks before that time, because of the new agreement coming up, and various Grievance Committee meetings, et cetera. So, I saw all of the defendants.

Q. Did you discuss the bad feature of striking

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Hack Gleichman.)

in war time with any of the people involved, in a group or singly?

A. Well, all through this period I had many discussions with groups and with individuals, and especially several of us—when I say “several of us”, I mean some of the Shop Stewards and myself, sometimes together and sometimes separately, would attempt to discourage such brothers as Alegre and Calixto from participating and encouraging this sort of activity.

Q. Do you know Rose Ros? A. I do.

Q. Genevieve Young? A. I do.

Q. Ina Paige? A. I do.

Q. Were they involved in this strike?

A. They were.

Mr. Duarte: That is all.

Miss Paige: May I ask a question now?

Mr. Duarte: Give your name to the Reporter.

Miss Paige: Ina Paige.

Cross Examination

By Miss Paige:

Q. I would just like him to explain how I was suspended, what happened that day down there, if he remembers me, Ina Mae Paige. I am the one who did not have my book when I entered the plant. If he remembers, I would like to have him tell just how it happened.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

A. I do remember, Mr. Chairman, that this was one of the sisters that participated in the strike. She was one of many that we eventually had to keep out for similar activity.

Q. What did I say that day, and why was I kept out? A. I don't remember that.

Miss Paige: I didn't have any book. They told me to return home and get my book, and then I could go to work. I did so, and when I returned they would not let me go in the plant. That is the only thing they could have against me at all. It may be out of order, but I would just like for them to know how that happened. This is the first time I have ever belonged to a union in my life, and that is the treatment I got.

Mr. Duarte: I don't want to make another objection, but everyone will have an opportunity to come up here and speak.

Miss Paige: That is all right, but I wanted to say that, since my name came up.

(Witness excused.)

Mr. Duarte: I would like to call George Squires.

GEORGE SQUIRES

called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duarte:

Q. State your name. A. George Squires.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of George Squires.)

Q. Book number? A. Book No. 0-2768.

Q. Were you employed at Colgate Palm-Olive
Peet plant in Berkeley on August 1, 1945?

A. I was.

Q. Did a strike occur on that date?

A. That's right.

Q. Did you see any of the Defendants walk out
on strike that day? A. I did.

Q. Did you see any Defendants urge anyone to
join the strike? A. I did.

Q. Can you give us their names? I have a list.
I will read them off and ask you if you know them.
Kay Norris? A. That's correct.

Q. Ann Cerrato? A. Correct.

Q. Henry Giannarelli? A. Correct.

Q. Manuel Souza? A. Correct.

Q. Mike Ramierez? A. Correct.

Q. Martin Heppler? A. Correct.

Q. Bill Howard? A. Correct.

Q. Glen Hixon? A. Correct.

Q. Alden Lee? A. Correct.

Q. Vincent Barboni? A. Correct.

Q. Felix Denkowski? A. Correct.

Q. F. L. Richmond? A. Correct.

Q. Harry Anderson? A. Correct.

Q. John Perucca? A. Correct.

Q. Nick Tate? A. Correct.

Q. Robert Ashworth? A. Correct.

Q. Manuel Munoz? A. Correct.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of George Squires.)

Q. Tommy Azevedo? A. Correct.

Q. Henry Hellbaum? A. Correct.

Q. All of these people, you state, were part of this strike and walked out on strike at that certain hour on August 1st? A. That's correct.

Mr. Perucca: I would like to ask a question there. You asked if he saw us talking somebody else into going out on strike.

Mr. Duarte: I have not asked that question yet.

Mr. Perucca: I thought you asked that question.

Mr. Duarte: I broke it up in two parts. Let me finish questioning the witness, and then we can go into it. We don't want this haranguing, if we can help it.

Q. (By Mr. Duarte): These people I have just named went out on strike that day, left their jobs?

A. Correct.

Q. Did you talk to any group of them or any individual in this particular group? A. No.

Q. Did you see them urging anyone to join the strike?

A. Only one that I know of, and that was in a department I work in.

Q. Who was that? A. Terry Anderson.

Q. In what way?

A. Well, he was intimidating, telling some of the other brothers that they would see how this thing would come out.

Q. Was he asking them to come off the job?

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of George Squires.)

A. That's correct.

Q. Was Manuel Alegre or Calixto Rigo involved in this strike?

A. Not to my knowledge.

Q. Were they involved in the strike after the strike took place? I mean, if they were not there that day, did they become a part of the strike?

A. No. They were both on vacations.

Mr. Duarte: That is all.

(Witness excused.)

Mr. Duarte: I will call Chuck Grube.

CHARLES GRUBE

called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duarte:

Q. State your name.

A. Charles Grube. Book No. 0-1869.

Q. Were you employed at Colgate Palm-Olive Peet's on August 1, 1945? A. Yes, I was.

Q. Did a strike occur there?

A. It did.

Q. What time? A. 12:00 o'clock sharp.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Charles Grube.)

Q. Did you see any of the Defendants here leave the job? A. Only one.

Q. Which one is that?

A. Katino Periera.

Q. Did you talk to her?

A. No, I didn't talk to him.

Q. Him, I mean. I am sorry.

Did you see anyone urging anyone to join the strike? A. Not in this group, no.

Q. Did you at any time talk to any of the Defendants here, or those who are not here? Did you at any time talk to any of them after the strike occurred, about coming back to work?

A. No.

Q. Did the Union make an attempt to get these people back to work?

A. They did. They went up on the corners and talked to them.

Mr. Duarte: That is all.

(Witness excused.)

The Chairman: Will the Prosecutor call the next witness?

Mr. Duarte: At this time I would like to bring back the witnesses and ask one question.

I would like to first recall Gleichman, then Grube and Squires.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

HACK GLEICHMAN

recalled as a witness on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Duarte:

Q. To your knowledge, were these Defendants involved in the strike at Peet's?

A. They were.

Mr. Duarte: That is all.

(Witness excused.)

CHARLES GRUBE

recalled as a witness on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Duarte:

Q. To your knowledge, were the Defendants charged here involved in the strike at Peet's?

A. Yes.

(Witness excused.)

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

GEORGE SQUIRES

recalled as a witness on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Duarte:

Q. To your knowledge were the Defendants here involved in a strike at Peet's?

A. They were.

(Witness excused.)

Mr. Duarte: I would like to call Charles Leacock.

CHARLES LEACOCK

a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duarte:

Q. Will you state your name?

A. Charles Leacock.

Q. Your book number? A. 0-216.

Q. Were you employed at Colgate Palm-Olive Peet's on August 1, 1945? A. Yes, sir.

Q. Did a strike take place there?

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Charles Leacock.)

A. Yes, sir.

Q. What time? A. 12:00 noon.

Q. Did you see any of the Defendants leave their jobs? A. Yes.

Q. Were the Defendants here present and those not present, to the best of your knowledge, involved in a strike at Peet's? A. Yes, sir.

Q. Did the Union make any attempt to get these people back to work after the strike occurred?

A. They did.

Q. Can you tell us anything about it?

A. Well, in my own words: I went to the meeting that day. I got there around about 12:45. I attended the meeting, and from what I heard, which I was one of them at the time, they wanted to change affiliations. I think it was the next day Local 1-6 representatives came out, and we had a meeting at the plant.

Q. Let me ask you something before you go any further. We are not interested in the question of cause. We are interested in the question of what happened. We want you to start from the time there was a strike.

There have been certain statements made on causes. One statement was made that it was because the Business Agents were not there. The question of causes is not before the Board. It is a question of, Was there a strike or wasn't there a strike?

A. Oh, yes, there was.

Intervener's Exhibit No. 9—Proceedings
Before Warehouse Union—(Cont'd)

(Testimony of Charles Leacock.)

Q. Now, go on from there.

A. The strike lasted two days and one-half. We went back to work after the two days and one-half, after we heard what the executives from the Union had to say. I for one went to the Hall and I tried to urge these people to go back to work. I was interrupted several times, because they did not care to hear what I had to say, and they went on from then.

Q. How long have you worked at Peet's?

A. About four years and a half.

Q. Do you work day shift or night shift?

A. Night shift.

Q. Were any of the Defendants in here on the night shift?

A. Some of them, alternatively.

Q. If a strike occurred at 12:00 o'clock noon, what time does the night shift go to work?

A. On the graveyard, 11:00 o'clock.

Q. Can you explain to me how a man who goes to work at 11:00 o'clock at night becomes a part of a strike that occurs at 12:00 o'clock in the afternoon?

A. Well, in my common language, the only way I can explain that is if he tried to help contribute to the prolonging of that strike.

Mr. Duarte: That is all.

(Witness excused.)

Mr. Duarte: Mr. Chairman, I would like to ask

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for about a 5-minute recess before we go on, if there is no objection.

The Chairman: We will take a recess of 5 minutes.

(Short recess.)

Mr. Duarte: Mr. Chairman, I would like to apologize for one omission. That was that before I questioned Miss Stanley, she had not been sworn in. If there is no objection, we will stipulate to the fact that she is what she says she is.

The Chairman: Is there any objection?

Voices: No. No objection.

Mr. Hixon: It has been pointed out that we were off work for two and a half days. I think the majority of us here have agreed to that, that we——

The Chairman: Excuse me. Before you go any further, are you one of the Defendants?

Mr. Hixon: Yes. I sure am.

The Chairman: You will have to take the oath, like the rest of them.

Mr. Hixon: I was just getting this thing over in a hurry.

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GLEN HIXON

a witness called on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Witness: We have talked it over amongst us, and it has been pointed out that we participated in this strike, and if that is what you will charge us with, and if it will help things out any more, we will plead guilty on that charge of participating in that strike.

Mr. Perucca: I don't plead guilty to the charges, because according to what Gonick says, he says any group participating in the strike will be censored as a group, and a lot more than 28 people participated in that thing. I will agree that I walked out with the rest of them.

Mr. Silva: Mr. Chairman, if he knows of any other members who walked out on the strike, charges will be filed against them and they will be brought in.

Mr. Perucca: There were 200 of them.

Mr. Duarte: I will object to this, because under the procedure, the people who are here and those that left who stated they would not stand trial, were charged under the Constitution with being in a strike. The brother here states that he was involved in that strike. That is what we are here to prove, whether or not you were involved in a strike.

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Before Warehouse Union—(Cont'd)

(Testimony of Glen Hixon.)

The Witness: I agree. The morning we was there, that morning, that is what I would plead guilty to, because I did not take part in agitating the strike, but I will admit I walked off the job with the rest of them, and I am willing to plead guilty, and I think the majority of them—they asked me to speak for them—I think they will plead guilty to the charge.

Mr. Duarte: Mr. Chairman, in order to expedite the proceedings, I would like to have each one take the stand and make a statement as to whether or not they are guilty of this charge or not guilty of the charge.

The Witness: That is all right. I just thought maybe if we could plead as a group, it would just help the thing out.

Mr. Duarte: Are you suggesting that we ask each individual one here whether or not they plead guilty to the one charge as to whether or not they went out on strike? Because, a lot of people have gone.

The Witness: Yes, sir, I do.

Mr. Duarte: And your name is——

The Witness: Glen Hixon.

Mr. Duarte: I would like to suggest that the Clerk read the roll and have each Defendant stand up and state whether or not they will plead guilty to the charge of being involved in this stoppage of work.

The Chairman: We have no objection to that.
(Witness excused.)

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The Clerk: We already have Mr. Hixon, is that correct?

Mr. Duarte: Yes.

The Clerk: Martin Heppler?

Mr. Heppler: I plead guilty to going out on the two and a half day's strike.

The Clerk: If you don't mind, I only have the last names. Is it all right to do it that way?

Mr. Duarte: Yes.

The Clerk: Azevedo.

Mr. Azevedo: I don't know whether I was guilty or not, because when we walked out I didn't know we were going out on strike. The reason I walked out was, all our Shop Stewards were suspended from the Union, put out of the plant.

Mr. Duarte: I would like to ask this, Tom. The question we have to decide here tonight is whether or not anyone left that job, struck that job at 12:00 o'clock noon on August 1st, and left the job. That is what we are trying to decide here.

Were you or were you not involved in the strike?

Mr. Azevedo: Yes. I walked off the job for a reason.

Mr. Duarte: Do you plead guilty or not guilty to the charge?

Mr. Azevedo: All right. I am guilty.

The Clerk: Zulaica.

Mr. Zulaica: I plead guilty.

The Clerk: Souza.

Mr. Souza: Yes.

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Before Warehouse Union—(Cont'd)

The Clerk: Manuel Souza?

Mr. Souza: Yes.

The Chairman: Guilty or not guilty?

Mr. Souza: Yes. I want to talk about the stooges. Everybody go out and chased the stooges off the jobs. First they call on the members. That is the way they all go out.

The Chairman: The question here is if you are guilty or not guilty.

Mr. Souza: I am guilty.

The Clerk: Ashworth.

Mr. Ashworth: I am guilty.

The Clerk: Denkowski.

Mr. Denkowski: Yes. I walk out, too. Yes, sure, I plead guilty for walking out.

The Clerk: Barboni.

Mr. Barboni: Guilty.

The Clerk: Rigo.

Mr. Rigo: They way it looks to me, I don't see how I can promote or encourage a strike when I——

Mr. Perucca: He wasn't there.

Mr. Rigo: I wasn't there.

Mr. Duarte: He is charged under another charge.

The Clerk: That is right. I am sorry.
Lee.

Mr. Lee: I plead guilty.

The Clerk: Perucca?

Mr. Perucca: Well, I am guilty from about

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12:00 noon until 8:00 o'clock or 9:00 o'clock the next day.

Mr. Hixon: He was out. That's all there was to it.

The Clerk: Munoz.

Mr. Munoz: Guilty.

The Clerk: Cerrato. Ann Cerrato.

Miss Cerrato: Guilty.

The Clerk: Ros.

Miss Ros: Guilty.

The Clerk: Paige.

Miss Paige: Guilty, I guess. I don't feel that way.

The Clerk: Tate.

Mr. Tate: Guilty.

The Clerk: That is all I have. Is there anybody here that did not plead?

Mr. Duarte: Did we miss anybody's name?

Mr. Periera: K. Periera.

The Clerk: K. Periera.

Mr. Periera: How come that man is down here tonight, when he was up on his vacation at the time of the strike?

Mr. Duarte: The charges against Rigo—Is that the name?

Mr. Rigo: (Nodding affirmatively.)

Mr. Duarte: —are a question of fomenting and encouraging a strike at Colgate-Palmolive-Peet. Are you guilty or not guilty of that charge?

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Mr. Rigo: No, I am not guilty. I can't be.

Mr. Duarte: Very well.

This charge will be taken up, and we will try to prove this brother was engaging in the fomenting of a strike at the Peet plant.

Is that the whole list?

The Clerk: Yes.

Mr. Duarte: There are two separate petitions here. First we have the question of those people engaged in the wartime strike. Second, we have a witness against Brother Rigo.

I suggest that we dispense with the largest group, and that those people who are here who have pleaded guilty to the charge, then——

Is Alegre here?

Voices: No. No, he is not.

Mr. Duarte: He left.

Then I suggest that we take up the question of Brother Rigo. We only have one witness on that particular thing, and the Committee can decide the two issues.

You have one here where a group of workers were involved in a strike, and you have one worker who claims he was not involved in that strike and has other charges against him. So, I suggest we dispense with one and go into the other.

I would like to suggest that if any one member of the group of Defendants wishes to make any

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statement to wind up this case, I will make a closing statement after they do.

The Chairman: The first thing we should find out is if the case is closed, that is, if either side has presented whatever they want to present. That is one thing. We want to find out if the Defendants or the witnesses have any more to say at this particular time. Otherwise, we will proceed.

Mr. Duarte: Pardon me for interrupting, Mr. Chairman, but we have no other evidence to present, except the case of Brother Rigo, which we will deal with separately. The rest of the cases are closed, as far as the prosecution is concerned.

Mr. Gleichman: Mr. Chairman, may I present my testimony now?

Mr. Duarte: No, not yet.

The Chairman: Do the parties wish to present oral arguments? Do the two parties wish to have discussions between themselves? We will give 15 minutes to each side, if you wish to do that.

Mr. Denkowski: For what, Mr. Chairman?

The Chairman: For whatever you may be interested in. If you want to have a discussion between yourselves, we can give you whatever you want; ten minutes, five minutes or fifteen minutes.

Mr. Souza: We all plead guilty.

Mr. Duarte: If there is no objection, I would like to withdraw my first statement on the basis of handling the Rigo case separately, present that evi-

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dence now and then wind up the case all at once. If there is no objection to that, we can do it on that basis.

The Chairman: All right. The Chair will rule that we go ahead that way.

Mr. Duarte: Mr. Gleichman.

HACK GLEICHMAN

called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duarte:

Q. Two brothers have been charged under the corrected Bill of Particulars, the letter, Exhibit E, dated December 13, 1945, where Brother Rigo and Brother Alegre are charged with fomenting and encouraging a wartime strike at Colgate-Palmolive-Peet Company. Have you any statement or any evidence in support of these charges?

A. Mr. Chairman, on at least four different occasions I spoke to both brothers, Alegre and Rigo, regarding their activities in talking strike before the strike occurred, regardless of whether they were there when the strike took place or not, because in my job, in working with the Stewards and in working with those that were trying to carry out

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(Testimony of Hack Gleichman.)

the program of the Union in this particular plant, I naturally was aware that something was going on, and so I tried to ferret out those individuals who were most active, which I had to do continually from that point on. Both of these brothers were outstanding in their activity prior to the strike, and that, as far as I know, is fomenting a strike.

Mr. Rigo: May I speak on that?

Q. Did they discuss the question of strike with anyone?

Mr. Rigo: May I interrupt that, please?

Mr. Duarte: Wait until I finish, will you?

Q. (By Mr. Duarte): Did they discuss the question of striking against the Union or against the Employer, either one, to your knowledge?

A. Well, the way the thing developed, there was no fine line of demarcation between what kind of strike it was. They were just talking in general terms about striking, and at times they would have an audience of two or three or four, and sometimes they would have an audience of eight or ten. Sometimes I would see it personally, and sometimes I would hear about it and get to it before it was terminated.

Q. Then, in your opinion these discussions of strikes led up to the August 1st incident, where the people walked off the job?

A. Absolutely. They were indulging in what I consider a super-militant attitude on this particu-

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(Testimony of Hack Gleichman.)

lar question of getting the people aroused to taking some kind of overt action which, even to me at the time, I didn't know what was going on. It wasn't until the thing hit that I was convinced that this was what they were out to do. They were leaders in it.

Q. Did you discuss this with either one of the brothers, the question of the action?

A. Sure, I discussed it.

Mr. Rigo: No. That is wrong. He did not discuss it.

The Witness: I have taken an oath, Mr. Chairman, and I will say that I discussed it with the brothers, not once but at least four times, to my knowledge, that their activities were detrimental to the smooth running of the operation at Colgate-Palmolive-Peet.

Q. (By Mr. Duarte): Are you referring to Brother Rigo and Brother—— A. Alegre.

Q. ——Alegre. You state that they did foment or were part of or were engaged in discussing the question of strike action? A. I do.

Q. And that this agitation for strike action, in your opinion, fit into the pattern of the August 1st strike? A. That is correct.

Mr. Duarte: That is all.

Do you want to ask him some questions?

Mr. Rigo: Yes.

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(Testimony of Hack Gleichman.)

Cross-Examination

Mr. Rigo: To tell you the truth, I never see this man until after the strike, after I came back from my vacation. Now, how can I foment or encourage anybody after the strike was done?

The Witness: Mr. Chairman, may I answer that?

The Chairman: Yes, you may answer.

The Witness: All I can say is that I was there from June 18th until right now. As a matter of fact, I was at Peet's today. I am there at least a few times a week. Anybody that has not seen me must be blind. That is all I can say.

Mr. Duarte: That is all the questions I have.

Do you want to ask him any more questions?

Mr. Rigo: Yes.

When was the first time I saw you there? It was when I paid my dues. That was when I came back from my vacation. When I came back from my vacation, that was on the 8th of August, and a week after then you came and collected dues. That is the first time I saw you in there, and I don't see how I can be responsible for encouraging people to go out on that strike.

Mr. Duarte: Let me ask you: What was the first time you met this brother?

The Witness: I would say roughly that the first

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(Testimony of Hack Gleichman.)

time I warned him was about a week prior to the——

Mr. Rigo: No, it wasn't.

The Witness: ——to the strike.

Mr. Rigo: One week prior to the strike, I wasn't there.

The Witness: Well, a week prior to the action of the strike.

Mr. Rigo: I wasn't there.

Mr. Duarte: That is all.

(Witness excused.)

Mr. Duarte: I would like to make a few remarks, if it is in order, under Point 14. We can go back there, Mr. Chairman, where you stated that each side would have fifteen minutes to close the argument, and that the Prosecution would open and close the argument.

I want to say that the Union charges these defendants, with the exception of Rigo and Alegre, with being engaged in a wartime strike. The evidence presented and the stipulations entered into prove that there was a wartime strike.

This Union has a history of militancy that no other Union in the country can match in terms of fighting for job rights, fighting for wages, and, yes, strikes. This Union has a reputation for conducting and bringing to a successful conclusion strikes. But, this Union took an oath during the

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war that there would be no strikes and there were no strikes, with the exception of this strike that occurred at Palmolive-Peet.

The Prosecution maintains that the strike at Colgate-Palmolive-Peet was an action that gave this Union, so to speak, a "black eye" in the history of labor. Our record was 100 per cent during the war, and that record would have maintained its 100 per cent stature if this action had not been taken.

I want to emphasize that whether we deal with our membership as committees, or whether we deal with employees, or the International, or the National CIO, when we make a pledge we have a reputation of maintaining that pledge. If it is a fight for wages, we carry it through with the whole support of our entire Union and International Union, and when we made a pledge that there would be no strikes, we made it, not with our tongue in our cheek, but we made it as sincere trade unionists in attempting to win the war.

That has been the position of this Union since Pearl Harbor and before, that there would be no strikes. Even if this program of no strikes did not meet with the approval of a lot of people in and out of labor, we kept that record faithfully until this particular incident came about.

We ask that the Trial Committee fix the proper penalties for the action of the August 1st strike.

That is all I have to say.

The Chairman: In closing, I have this to say,

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that the Trial Committee, consisting of five members——

Mr. Heide: Just a minute. This is off the record.

(Remarks outside the record.)

The Chairman: Does anybody wish to say something?

Mr. Azevedo: I am still going to insist that the time we walked off the job we did not walk out with the intention of going out on a strike. The reason we walked off that plant was because our Stewards were suspended. After we walked off, we stayed the following day, and they said we were out on strike, but none of us walked out with the intention of going out on strike. There was this question of going out for a little while.

Miss Paige: Absolutely. I feel the same way, because no one is more opposed to a wartime strike than I am, and I don't like to be accused of it.

Mr. Denkowski: I didn't know I was walking out on a strike when the foreman came in at 11:00 o'clock, and I was blowing granulated soap. The foreman comes in and tells me to close. I didn't know a thing about it. The brother just said that none of us attended the meeting, and the brother knows that I did attend the meeting. We were going to elect a Steward. I didn't know a thing about it being a strike. Everybody went, and I went with them. I didn't know a thing about there being a strike. That is all.

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Mr. Hixon: Of course, we cannot plead our ignorance for all of the 21, I will admit that. But, when we went out there at noon it was with the intention of holding a meeting and coming back, but then, after we got into this meeting we was misled to the extent that they did not want to call it a strike. They wanted to call it a continuous meeting, but, as far as walking off, at the time, if I had thought we was going to participate in a strike, I myself did not know that until we got into this meeting, and then, the rest of them, they just stayed out. But, as far as anybody coming through the plant and telling us, "You are going to a meeting," or "You are going out on strike," if it was told, it wasn't told to me at the time.

Mr. Perucca: I would like to make a little speech. I would like to make a statement that when the Trial Committee arrives at their decision, they take into consideration that there was about 300 of us that went out, instead of just 28, and also I was told by a Union member—I believe he knows what he is talking about—that the dried fruit strike, or work stoppage, whatever you call it, was called during wartime. I would like to have you take that into consideration, too.

Mr. Rigo: If these people go out without the intention of going out on strike, how can I be promoting a strike?

Mr. Duarte: If there are no further statements, I would like to close the trial by just hitting on a

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few points. That is, if there are no further statements, because when I have finished, I believe that is the end.

The Chairman: Are there any further statements that anyone wants to make?

Mr. Gleichman: A point of information, Mr. Chairman. May I have it?

The Chairman: Yes.

Mr. Gleichman: That dried fruit strike was after the war, not before.

Mr. Perucca: I am not familiar with it. I was just told that it was so. I don't know.

Mr. Duarte: If there are no other statements, I would like to make one.

1. Continuous meetings, going fishing, prayer meetings, or any other type of meeting during the war that are used or were used to keep workers off their jobs and stop production, was a strike. There are no two ways about it. There were many unions that had prayer meetings that lasted two weeks. There were many unions that had continuous meetings that lasted that length of time. Going fishing was a good example of how some unions struck. But, it was all subterfuge, it was all strikes, and it was a strike, when it got down to the sense of it. People were not working. They just did not go to work. They went to meetings. They did not hold meetings. They struck. It was a strike without pickets.

Any stoppage of work during the war was a

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strike. You could not call it anything else but a strike. Give it any name you want, but it was a stoppage of work, and it was a strike.

The question of whether these people were engaged in a strike or not I think has been clearly shown by their own arguments and by the evidence presented. These people have been charged, these people and these people alone. But, I want to make one point that the Committee should take into consideration.

(1) That when this trial started there was a group of people here who are no longer present, but who left the meeting and refused to stand trial.

(2) That the people that remained did have an opportunity to state whether or not they were or were not engaged in a strike, a stoppage of work, a continuous meeting, a prayer meeting, or whether they went fishing. But, it all boils down to the fact that they were all engaged in a strike and a stoppage of work.

As to the two defendants who are charged with fomenting a strike, the proof I think exists in the fact that one of the brothers so charged left the meeting and refused to stand trial. The other brother remained and stood trial.

The evidence is before the Committee, and I say again that it is now the duty of the Committee, as they are charged by the membership of this Union, to search the record and make their recommendation to the membership.

Mr. Denkowski: Brother Chairman, a point of

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information. I don't know, and maybe I am wrong, but there are quite a few of us—there is only a little group here, not the 200 or so people who went on strike and stayed for two and a half days. There are only a few of us in here, and some way or another we are taking a beating, or something, for the other people. They went on a strike for two and a half days. Why can't we all get punishment, instead of a few?

The Chairman: Does anyone have anything to say?

Mr. Duarte: I just want to reiterate that these people were charged. I want to point out once again that because there were other people who might have been in the same circumstances but were not charged does not excuse the guilt of anyone who was involved in the strike.

I think, Mr. Chairman, that ought to wind up the trial, and we should not get into a cross-fire here between the Defendants, myself and you.

Mr. Heppler: May I state one more thing, if I may?

I would like the Trial Committee to take into consideration that we have been off the job for going on close to four months, also, when they bring in their recommendations to the rank and file.

The Chairman: In closing, we on the Trial Committee of five members will try to come to a conclusion. We will consider both cases, the testimony of the witnesses and of the Defendants, and we will try our very best to come to what we consider

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a fair decision of the issue. It will be presented at the next regular membership meeting, held the fourth Thursday night of this month at the Auditorium.

Mr. Duarte: That is the 27th.

The Chairman: The 27th would be right. This will all be done according to our Constitution.

If nobody else anything more to say, I think we can adjourn the meeting.

(Whereupon, at 10:30 P.M., Monday, December 17, 1945, the hearing of the Trial Committee was adjourned.)

[Endorsed]: No. 11514. United States Circuit Court of Appeals for the Ninth Circuit. Colgate-Palmolive-Peet Company, Petitioner, vs. National Labor Relations Board, Respondent, and International Chemical Workers Union, A.F.L., et al., Intervenor, and Warehouse Union Local 6, International Longshoremen's & Warehousemen's Union (CIO), Intervenor, and National Labor Relations Board, Petitioner, vs. Colgate-Palmolive-Peet Company, Respondent. Transcript of Record. Upon Petition to Review and Petition to Enforce Order of the National Labor Relations Board.

Filed February 3, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL CHEMICAL WORKERS
UNION, A. F. L., et al.,
Intervenors,

and

WAREHOUSE UNION LOCAL 6, INTER-
NATIONAL LONGSHOREMEN'S & WARE-
HOUSEMEN'S UNION (CIO),
Intervenor,

and

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

COLGATE-PALMOLIVE-PEET COMPANY,
Respondent.

FILED

MAY - 7 1942

BRIEF FOR PETITIONER,
COLGATE-PALMOLIVE-PEET COMPANY.

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No. 11,514

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL CHEMICAL WORKERS
UNION, A. F. L., et al.,
Intervenors,

and

WAREHOUSE UNION LOCAL 6, INTER-
NATIONAL LONGSHOREMEN'S & WARE-
HOUSEMEN'S UNION (CIO),
Intervenor,

and

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

COLGATE-PALMOLIVE-PEET COMPANY,
Respondent.

BRIEF FOR PETITIONER,
COLGATE-PALMOLIVE-PEET COMPANY.

STATEMENT OF JURISDICTION.

The Petitioner herein, is Colgate-Palmolive-Peet Company, a corporation (hereinafter called Petitioner).

This matter comes before this Court on Petitioner's petition for review (R. 101-126) of a decision of the National Labor Relations Board (R. 68-85) (hereinafter called the Board) in a complaint case filed by the Board against the Petitioner. The complaint (R. 4-10) was based on charges of unfair labor practices brought by International Chemical Workers Union, A.F.L., plaintiff in intervention herein (hereinafter called AFL). Three charges were preferred by the A.F.L. The first charge was filed on August 14, 1945 (R. 92-93); the second or first amended charge was filed on October 4, 1945 (R. 89-92); and the third or second amended charge was filed January 18, 1946. (R. 1-4.)

Opinion below.

The opinion, decision and order of the Board is reported in 70 N.L.R.B. 1202, and entitled therein "In the Matter of Colgate-Palmolive-Peet Company and International Chemical Workers Union, A. F. of L." (Case No. 20-C-1937; R. 68-85).

Jurisdiction.

The petition herein was filed on December 30, 1946. At that time the National Labor Relations Act (hereinafter sometimes referred to as the Wagner Act), 29 U.S.C.A., Sec. 160(f), then in effect, conferred jurisdiction upon this Court to review orders and decisions

of the Board, and provided the procedure therefor. The Labor Management Relations Act, 1947 (hereinafter sometimes referred to as the new Act or the Taft-Hartley Act), 29 U.S.C.A., Sec. 160(f), now in effect, likewise confers jurisdiction upon this Court to review such orders and also provides the procedure therefor.

STATEMENT OF THE CASE.

This is a petition for review (R. 101) of a decision and order (R. 68) of the Board dated September 6, 1946. In this decision the Board found that the Petitioner had discharged and refused to reinstate thirty-seven of its employees because of their activities on behalf of the AFL and against International Longshoremen's & Warehousemen's Union No. 6, CIO (hereinafter called CIO) in violation of Section 8(1)(3) of the National Labor Relations Act of 1935¹ (29 U.S.C.A., Sec. 158(1)(3); R. 79). It is *important* to note in connection with this finding that the Board also found or concluded that:

1. At the time this case arose there was a valid contract, entered into and executed in compliance with the terms and conditions of the proviso to Section (8)(3)² of the National Labor Relations Act, between the Petitioner and the CIO, which required

¹Substantial changes in and additions to Section 8 of National Labor Relations Act have been effected by the enactment of the Labor Management Relations Act, 1947.

²The text of Section 8 of the National Labor Relations Act is set forth at pages 6-7, *infra*.

as a condition of employment membership in the CIO (R. 69).

2. At the time this case arose a question concerning the representation of Petitioner's employees was pending. (R. 75.)

3. The employees involved were suspended from membership by the CIO, and were discharged by the Petitioner at the request of the CIO under the terms of the contract. (R. 70; 71; 74-75.)

4. Twenty-eight of the employees involved had participated, prior to their discharge, in a strike. (R. 70; 72.) (The Board in its decision fails to note or mention the admitted fact that this strike was not sanctioned by the CIO (R. 258), and was contrary to and in violation of the CIO policy and pledge not to engage in strikes during the course of the war (R. 420-421; 506-507), and that the nine other employees involved all had a part in fomenting this strike. (R. 202-203; 274; 296; 366-367; 404-407; 420-421).)

5. All of the employees involved, prior to their discharge, engaged in activities intended to displace the CIO as the bargaining representative of Petitioner's employees and to substitute in its stead the AFL. (R. 70-72.)

6. All the employees involved, prior to their discharge, advised the Petitioner and the CIO that they had withdrawn from the CIO.

7. The CIO, after trial expelled³ all the employees involved, "principally for their anti-CIO conduct in 'undermining union policies.' " (R. 75.) (In this finding the Board is referring to two decisions of trial committees of the CIO which are evidence as Intervenor's Exhibits Nos. 6 and 7. (R. 856; 867.) These show that five employees, who had been CIO stewards were found guilty of failing to enforce the CIO policy against racial discrimination (R. 862), and of failing to perform other duties of their office (R. 863; 864); that four of the employees were found guilty of fomenting the war-time strike, and of defaming an officer of the CIO (R. 865); and that twenty-seven employees were found guilty of participating in or fomenting a war-time strike. (R. 873).)

8. The CIO, although it expelled and suspended the employees for "undermining union policies", as set forth in 6 above, in so doing *was motivated solely by its desire to punish them for their activities against it and on behalf of the AFL.* (R. 76.)

9. Although the Petitioner knew of several valid reasons, including the activities described in 5 and 6 above, on which the CIO could have justified the expulsion and suspension of the employees, it also *knew*, when it discharged the employees, that the CIO in so

³The Board is in error in finding that all the employees were expelled. The record makes it clear that at least fifteen of the persons involved pleaded guilty, before a trial committee of the CIO, to the charge of participating in a wartime strike in violation of the CIO policy and pledge, and were placed on probation, not expelled. (R. 506-507; 328-329.)

suspending and expelling them *was motivated solely by its desire to punish them for their activities against it and on behalf of the AFL*, and Petitioner, therefore, violated Section 8(1)(3) of the National Labor Relations Act. (R. 76.)

10. The Petitioner made no *bona fide* effort to evaluate the evidence before it, otherwise it would have drawn therefrom the same inferences and deductions as did the Board, and would have inevitably concluded that the CIO in requesting the discharges was acting in reprisal against the employees because of their anti-CIO activity (R. 78; 79).

On the basis of the foregoing findings, the Board ordered the Petitioner to:

Cease and desist from discouraging membership in the AFL, or encouraging membership in the CIO by discharging or refusing to reinstate any of its employees (R. 80).

Offer to the discharged employees immediate and full reinstatement (R. 81).

Make whole the discharged employees for any loss of pay suffered by them by reason of Petitioner's alleged discrimination (R. 81).

Section 8(1)(3) of the National Labor Relations Act, allegedly violated by Petitioner, provided as follows:

“Section 158.⁴ Unfair Labor Practices by Employer Defined.

⁴Section 8 of National Labor Relations Act.

It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157⁵ of this title.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided, That nothing in sections 151-166⁶ of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted, by any action defined in sections 151-166⁷ of this title as an unfair labor practice) to require as a condition of employment memberships therein, if such labor organization is the representative of the employees as provided in Section 159(a)⁸ of this title, in the appropriate bargaining unit covered by such agreement when made.*” (Italics ours.)

29 U.S.C.A., Section 158(1)(3.)

Section 7 of the National Labor Relations Act mentioned in Section 8(1) above read as follows:

“Section 157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations,

⁵Section 7 of National Labor Relations Act.

⁶Sections 1 to 16 of National Labor Relations Act.

⁷Sections 1 to 16 of National Labor Relations Act.

⁸Section 9(a) of National Labor Relations Act.

to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”

29 *U.S.C.A.*, Section 159⁹.

In view of the express language of the statute allegedly violated and of the facts and circumstances involved, this decision of the Board raises the following questions:

(a) Whether the Board usurped the powers and functions of Congress by adding, through alleged construction, the following qualification to the proviso to Section 8(3):

“No employer shall justify any discrimination against an employee for non-membership in a labor organization * * * if he has reasonable grounds for believing that membership was * * * terminated because of activity to secure a determination pursuant to Section 9 * * *, at a time when a question concerning representation may appropriately be raised.”¹⁰

(b) Whether the Board, by nullifying the “closed shop” contract and interfering in the internal affairs of a Union, usurped the powers and functions of Congress by adding, through alleged construction, the following specification of unfair labor practices to Section 8:

⁹Section 7 of National Labor Relations Act.

¹⁰Based on “Federal Labor Relations Bill of 1947” (S. 1126), as passed by the Senate (deleted in conference). See Special Supplement to Teller, “The Law Governing Labor Disputes and Collective Bargaining”, pp. 71, 72, and “The New Labor Law” (The Bureau of National Affairs), p. C-20.

“It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce * * * employees in the exercise of the rights guaranteed in Section 7: * * *;

(2) to persuade or attempt to persuade an employer to discriminate against an employee with respect to whom membership in such organization has been * * * terminated * * * because he engaged in activity designed to secure a determination pursuant to Section 9 * * * at a time when a question concerning representation may be appropriately raised.”¹¹

(c) If in answering (b) above, it is held that the Board did not have the power to penalize the CIO, directly or indirectly, for alleged unfair labor practices, whether the Board could require the vicarious expiation of the wrongdoing, if any, of the CIO through punishment visited upon the Petitioner.

(d) If it is held that the Board has properly construed Section 8, and has not usurped the powers and functions of Congress, whether the CIO's alleged unfair or malicious motivation deprives it of the legal right to discipline its members *because* of a plain and clear violation of its policy and pledge against war-time strikes.

¹¹Based on “Federal Labor Relations Bill of 1947” (S. 1126) as passed by the Senate. Subsection (1) was modified and expanded in the New Act; subsection (2) was deleted in conference. See Special Supplement to Teller, “The Law Governing Labor Disputes and Collective Bargaining”, p. 72 and “The New Labor Law (Bureau of National Affairs) p. C-21.

(e) If it is held that the Board has properly construed Section 8 and has not usurped the powers and functions of Congress, whether the Petitioner had the legal right and obligation to refuse to perform the admittedly valid "closed shop" provision of the agreement, if it knew that the CIO in exercising the legal right to discipline its members *because* of a plain and clear policy of its rules was motivated by malice and ill-will against those who sought to displace it as the representative of petitioner's employees.

(f) If it is held that the Board has properly construed Section 8, and has not usurped the powers and functions of Congress, whether members of a Union may immunize themselves against discipline *because* of a plain and clear violation of a Union's rules by manifesting their hostility to it.

(g) If it is held that the Board has properly construed Section 8, and has not usurped the powers and functions of Congress, whether the Board sustained the burden of proving that Petitioner knew that the CIO had disciplined its members *because* of their anti-CIO activity, and *not because* of their plain and clear violation of the CIO's policies against wartime strikes, racial discrimination, etc.

(h) If it is held that the Board has properly construed Section 8, and has not usurped the powers and functions of Congress, whether the Board sustained the burden of proving that the Petitioner made no bona fide effort to evaluate the evidence before it by showing that petitioner did not draw therefrom the

same inferences and deductions as the Board, and did not conclude, as did the Board, that the CIO in requesting the discharges was acting in reprisal against the employees because of their anti-CIO activity.

In the event that the construction which the Board placed on Section 8(1)(3) is held invalid as an usurpation of the powers and functions of Congress, these other questions are also raised.

(i) Whether the Board by nullifying the "closed shop" contract deprives the petitioner and CIO of property without due process.

(j) Whether the Board in ordering Petitioner to make whole the discharged employees for loss of pay deprives the Petitioner of property without due process.

Some of the questions above outlined were first raised in the pleadings filed by the Board and the Petitioner.

Board's complaint.

The Board's complaint¹² (R. 4-10) in Paragraph V thereof, charged that the Petitioner interfered with the rights guaranteed the employees in Section 7 of the National Labor Relations Act by discharging and threatening to discharge employees because of their membership in and activity in behalf of the AFL, or their failure or refusal to join or assist the CIO. (R. 6-7.)

¹²Only the allegations supported by the Board's decision are set forth.

In Paragraph VI of the complaint the Board charged that Petitioner had discharged Clyde Haynes, David Luchsinger, Frank Marshall, Sanford Moreau, Harry Smith, Edwin Thompson, Harold Lonnberg, Lincoln Olsen and William Sherman because of their activity in forming "Colgate-Palmolive-Peet Company Employees' Welfare Association" (hereinafter called the Welfare Association), and their attempts to substitute the Welfare Association for the CIO as the bargaining representative of the employees, and had subsequent to the discharge above mentioned refused to re-employ them because of their said activities, and because of their membership in and activity on behalf of the AFL. Said paragraph also charged that the Petitioner had discharged twenty-eight other employees because of their membership in and activity on behalf of the AFL and the Welfare Association. (R. 7-8.)

In Paragraph VII of the complaint it was alleged as a conclusion that the charges set forth in Paragraph VI constituted discrimination in regard to hire and tenure of employment of the individuals discharged, and was intended to discourage membership in the AFL and the Welfare Association and to encourage membership in the CIO (R. 8-9.)

Petitioner's answer.

In its answer (R. 10-16) the Petitioner sets forth the "closed shop" provision of the contract pursuant to which it acted, and which the Board seeks to set aside and nullify. The Petitioner has also averred in

its answer the facts concerning the discharged employees' participation in the strike, and the action taken against them by the CIO because of this activity.

The pertinent and material portions of Petitioner's answer are as follows:

"5. Further answering said paragraph VI, respondent avers as follows:

(1) At all times mentioned in said complaint and since the 9th day of July, 1941, there has been and there is now in existence a valid collective bargaining agreement entered into by and between respondent and said" CIO. "Section 3 of said collective bargaining agreement provides as follows:

'Section 3. The Employer agrees that when new employees are to be hired to do any work covered by Section One (1), they shall be hired through the offices of the Union, provided that the Union shall be able to furnish competent workers, for work required. In the event the Union is unable to furnish competent workers, the Employer may hire from outside sources, provided that employees so hired shall make application for membership in the Union within fifteen (15) days of their employment. *The employees covered by this agreement shall be members in good standing of the Union and the Employer shall employ no workers other than members of the Union* subject to conditions hereinabove prescribed. In the hiring of new help for the warehouses, they shall be hired through the offices of the' CIO. (Italics ours.)

“(2) At various times between July 30, 1945, and September 13, 1945, respondent has received communications from said” CIO “advising it that the persons named in said paragraph VI of said complaint had been suspended from membership in the” CIO “and were no longer members in good standing in said” CIO “and requesting that pending the determination of charges filed against said persons, said persons should be removed from respondent’s employ. *Respondent was advised by counsel that it had no alternative under the provisions of said section 3 of said collective bargaining agreement but to remove said persons from its employ* and pursuant to said advice it did remove said persons from its employ on dates set forth in said Paragraph VI of said complaint. (Italics ours.)

6. Further answering said Paragraph VI, respondent avers that it did not remove or discharge Clyde W. Haynes, David Luchsinger, Frank Marshall, Sanford Moreau, Harry A. Smith, Edwin Thompson, Harold Lonnberg, Lincoln Olsen and William Sherman because of their activity in forming the association, their attempts to substitute the association for the” CIO “as bargaining representative of respondent’s employees and/or because of their collective activity on behalf of respondent’s employees. In this connection, respondent avers that said persons above named were removed from respondent’s employ at the instance and request of the” CIO “because they were no longer members in good standing of said” CIO.

“Further answering said Paragraph VI, this respondent avers that it has not refused nor does

it now refuse to reemploy any of the persons named in said paragraph VI of said complaint because of their membership in and activity on behalf of the" AFL, "and in this connection respondent avers that because of its contractual obligations as herein set forth, it cannot reemploy said persons until such time as they again become members in good standing of said" CIO "and that respondent's refusal to reemploy them is based on the fact that said persons are not members in good standing of said" CIO.

"7. Further answering said paragraph VI, respondent is informed and believes and on said information and belief avers that Calixto Rigo, Robert Ashworth, Thomas Azevedo, Manuel Munoz, Nick Tate, Glen Hixson, Vincent Barboni, Martin Heppeler, Alden Lee, Felix Denkowski, Manuel Souza, Albert Zulaica, Ann Cerrato, Ina Mae Paige, Caetano Perreira, Rose Ros, and John Perucca, were charged by said" CIO "with violating the constitution of said" CIO "and policy of said" CIO "as adopted by majority vote of its membership and more specifically with participating in a three-day work stoppage during the war, in violation of said" CIO's "wartime no-strike pledge, and in this connection, respondent is also informed and believes and on said information and belief avers that all of said persons above named pleaded guilty to the charge and are now on probation for one year and have been given permission to work out of the" CIO's "hiring hall and be employed in other concerns having contracts with said" CIO "and that said persons are not during said period of probation members in good standing of said" CIO.

“Further answering said paragraph VI, respondent is informed and believes that Sebastian Ramirez, Terry Anderson, Henry Hellbaum, Henry Gianarelli, Ophelia Reyes, William C. Howard, Kay Norris, Genevieve Young, Frank Richmond and Manuel Allegre were also charged with the offense above specified but refused to stand trial and were expelled from said” CIO “and are not now members of said” CIO. (R. 12-15.)

Proceedings before the Board's Trial Examiner.

After the filing of Petitioner's answer, a hearing was held on the matter from February 4 to 8, 1946, at San Francisco, California, before Horace A. Ruckel, Esq., Trial Examiner duly appointed by the Board's Chief Trial Examiner. (R. 21; 164.)

At the opening of the hearing, the CIO made a motion to intervene, based on its interest in the contract here in question, and the motion was granted by the Trial Examiner. (R. 21; 168-176.) At the conclusion of the Board's case, the Petitioner made a motion, in which it was joined by the CIO, to dismiss the complaint. The Trial Examiner denied the motion, except as to certain allegations of the complaint, which alleged that the Petitioner removed notices of the AFL from its bulletin boards, that it kept AFL meetings under surveillance, and that it discriminatorily discharged Rose Gilbert. In these respects, the motion was granted. (R. 21.)

At the conclusion of the hearing, Petitioner renewed its motion to dismiss the complaint and at that

time the Trial Examiner reserved ruling thereon. (R. 21; 782; 783.)

Trial Examiner's decision in favor of Petitioner.

Thereafter, the Trial Examiner, in effect, granted Petitioner's motion to dismiss the complaint, when he determined in his intermediate report that Petitioner had not violated the National Labor Relations Act, and recommended to the Board that the complaint be dismissed. (R. 66-67.)

The Trial Examiner exhaustively reviewed the evidence submitted to him and determined that although Petitioner learned during the course of events herein involved that many of its employees were dissatisfied with the CIO, and that the CIO may have been motivated in securing their discharge by a desire to eliminate the opposition, it also knew of other acts done by the employees which afforded the CIO valid grounds and good cause for terminating their membership. The Trial Examiner, therefore, concluded, that the Petitioner was not called upon, at its peril, to assume the role of a judge for the purpose of determining whether the CIO's motivation was lawful or unlawful, and that upon the whole record it could not be found that Petitioner knew that the CIO had requested the discharge of the employees because of their activities on behalf of the AFL and against the CIO. In so finding and in so concluding, the Trial Examiner stated:

"That the contracting union might properly discipline members for participating in a strike

called in violation of union policy, by suspending or expelling them, seems to the undersigned hardly open to question. A labor organization, no less than any other organization, cannot be denied the authority to compel compliance with the decisions of its membership. 'Good standing' in an organization implies something more than the mere payment of dues.

"It is sometimes difficult to determine where permissible activity on behalf of a rival organization carries over into such overt acts of sabotage or obstruction directed against the contracting union, as seriously to impair the labor government in the plant and to invoke the union's discipline. It is for this reason, perhaps, that unions ordinarily seek to proscribe any activity on behalf of another labor organization, and to stigmatize it as 'dual unionism.' When this attempted proscription during an appropriate period, however, enlists the knowing cooperation of the employer, with the consequence that the offending member is discharged and deprived of his livelihood, the Board has not hesitated to find a violation of the Act. In each such instance, however, the Board has required knowledge by the employer, derived from information in its possession at the time it effectuated the discharge. *This information has heretofore been of such a nature as not to require any interpretation of evidence, or any independent investigation on its part.*

"The reasons for this seem clear. Any effective investigation which the employer might undertake would almost necessarily involve it in the internal affairs of the Union, and expose the re-

spondent to a charge of interference, restraint, and coercion in violation of the Act. In the instant case, for the respondent to determine to what extent participation in the strike of July 31, and the non-payment of dues, contributed to the suspension of the employees involved, and to what extent their activity on behalf of the A. F. of L. was a factor, the respondent would probably have had to question officers of the C.I.O. and to have had access to the minutes and records of the meeting or meetings at which the Union's decision to suspend them was made. Even then the respondent could hardly have escaped assuming the role of a judge. Such access to the records of a union, is, in effect, barred to him by the operation of the Act. In any event, he has no means of compelling it." (Italics ours.) (R. 63-65; 70 N.L.R.B. 1202 supra, at pp. 1229-1230.)

Board's decision overruling Trial Examiner.

The Board overruled the findings of its Trial Examiner, and found, as stated before, that Petitioner had violated the National Labor Relations Act. The reasoning of the Board in so finding is epitomized in the following quotation taken from its decision:

"The respondent's position, as revealed in its brief to the Trial Examiner, is that the *Rutland Court* and *Portland Lumber* cases are wrong; that it is for the Congress and not the Board to prevent employers from performing closed-shop contracts made pursuant to the express language of the proviso to Section 8(3) of the Act, if it appears desirable to prevent abuse of such contracts; and that in any event it would be 'unjust' to require the respondent to determine whether

the C.I.O.'s asserted motivation was 'merely ostensible and not real,' on the ground that the respondent could not 'necessarily have deduced' the C.I.O.'s true motive. We find no merit in these contentions. We are satisfied, particularly in view of the C.I.O.'s widespread and open campaign among the employees during the preelection period and the respondent's knowledge thereof, that the respondent made no *bona fide* effort to evaluate all the evidence before it when it allegedly decided, despite the C.I.O.'s failure to deny the obvious facts, to believe that the C.I.O. was not acting in reprisal against the complainants before their anti-C.I.O. activity." (R. 78, 79; 70 N.L.R.B. 1202, *supra*, at p. 1208.)

From the foregoing, it is evident that three basic errors permeate the whole of the Board's decision:

(a) That the Board had power under the National Labor Relations Act to prevent the coercion of employees by other employees or labor organizations.

(b) That an act though lawful in itself is converted by a malicious and bad motive into an unlawful act.

(c) That the obligor, in a lawful contract, performs the terms thereof at his peril unless he ascertains the true state of mind of the obligee.

Proceedings had after the decision of the Board.

After the issuance of the decision and order of the Board, Petitioner filed a motion to reconsider, and

this was denied by the Board on November 6, 1946. (R. 85.)

Thereafter, on December 30, 1946, Petitioner filed its petition for review. (R. 101-126.)

On February 3, 1947, the Board filed its answer to said petition, and its request for the enforcement of its order. (R. 134-143.)

On February 17, 1946, this Court made and entered its ex parte order permitting the CIO, the AFL and the discharged employees to intervene in the proceeding. (R. 143-144.)

Pursuant to this order, the CIO, the AFL and the discharged employees have filed their complaints in intervention herein. (R. 144-150; 151-156.)

The complaint of the AFL and the discharged employees prays for the enforcement of the Board's order.

On March 1, 1947, Petitioner filed its answer to the complaint in intervention of the AFL and the discharged employees. (R. 156-163.) In its said answer, Petitioner prays for the dismissal of said complaint in intervention, and questions the right of the AFL and the discharged employees to intervene, on the ground that they have no interest in the subject matter of the order made by the Board or its enforcement, until such time as a final order is entered decreeing enforcement or denying it. (R. 159-160.) Petitioner submits that its prayer for dismissal of said complaint in intervention should be granted on the basis of the following authorities:

“It is settled that the Act creates no private right, and that there is no authority anywhere save in the Board itself to inaugurate proceedings for the enforcement of the Board’s order or of the decree entered upon its petition. The award of back pay is not a private judgment or a chose in action belonging to the employee, and he has no property right in the award pending his actual receipt of it. Until that time the subject matter remains exclusively under the administrative authority of the Board and in control of the court, and outside interference of any sort would tend inevitably to shackle or impede the free exercise of their powers.”

N.L.R.B. v. Sunshine Mining Co. (9th CCA; 1942), 125 Fed. (2d) 757 at 761.

“The union has asked leave to intervene. This proceeding is in the public interest, prosecuted by an authorized agency of the Government, in furtherance of an express policy and intent upon the part of Congress to establish, in behalf of the national public, a standard of conduct presumably productive of progress in protection of the public welfare. In such proceedings, private parties have no rightful place except as the court may desire to avail itself of helpful suggestions. Seeing no such necessity in this proceeding, we deny the application.”

Aluminum Ore Co. v. N.L.R.B. (7th CCA; 1942), 131 Fed. (2d) 485 at 488.

NARRATIVE OF THE FACTS.

The record of this proceeding establishes that there is no history of hostility on the part of the Petitioner to the organization or unionization of its employees.

It is conceded that the Petitioner was engaged in interstate commerce and was thus subject to the provisions of the National Labor Relations Act (29 U.S. C. A. 151, et seq.) (R. 177.)

The Petitioner is a manufacturer of laundry and toilet soaps and glycerine. (R. 177; 559.) It maintains and operates manufacturing plants in various parts of the United States, including one located at Berkeley, County of Alameda, State of California. (R. 177.)

The events out of which this proceeding arises occurred at Petitioner's Berkeley plant. At the time of the happening of these events, Petitioner was manufacturing glycerine for war purposes and was producing it at the rate of between four and five hundred thousand pounds per month. (R. 559.) The course of these events extends from July 26, 1945 to October 15, 1945, but there are other occurrences which preceded and followed them, which have an important bearing on the case and which must of necessity be considered in arriving at a decision herein.

Petitioner's employees were first organized in 1936. At that time and for approximately two years thereafter, the I.L.A., affiliated with the American Federation of Labor, was the bargaining agent for said employees. Subsequently, on or about 1938, the employees

shifted their allegiance from the I.L.A. to the CIO. (R. 286; 625.) The CIO is, was and had been, since 1938, the bargaining agent for Petitioner's employees in the proper bargaining unit.

On or about July 9, 1941, the CIO, as the bargaining agent of Petitioner's employees, entered into a collective bargaining agreement with Petitioner. (R. 221-223.) Section 3 of this contract has an important bearing on the issues presented by this case. Section 3 reads as follows:

“Section 3. The Employer agrees that when new employees are to be hired to do any work covered by Section One (1), they shall be hired thru the offices of the Union, provided that the Union shall be able to furnish competent workers for work required. In the event the Union is unable to furnish competent workers, the Employer may hire from outside sources, provided that employees so hired shall make application for membership in the Union within fifteen (15) days of their employment. *The employees covered by this agreement shall be members in good standing of the Union and the Employer shall employ no workers other than members of the Union subject to conditions herein above prescribed.* In the hiring of new help for the warehouses, they shall be hired through the offices of the Warehouse Union, Local 1-6, I.L.W.U.” (R. 787-788.) (Italics ours.)

It has been admitted by the Board and by the AFL that the contract was, during the period covered by the events out of which this proceeding arose, valid; that the Board did seek to set it aside, and further

that the CIO was not dominated by the Petitioner. (R. 170-171; 271; 178-179.)

The Petitioner employed at its Berkeley plant at or about the time of the events herein narrated, 313 persons, exclusive of foremen, supervisory and executive employees. (R. 422.)

The management of the plant was in the hands of the following named gentlemen: Mr. Charles Wood, Mr. Bert W. Railey, Mr. C. A. Altman, Mr. C. R. Carter and Mr. Don E. Stanberry. (R. 180-182.) Mr. Wood was the purchasing agent for the respondent and in charge of its labor relations. (R. 180; 720.) Mr. Railey was vice president of the Petitioner, in charge of operations and all business of the Western Division of Petitioner, which includes Kansas City and Berkeley. (R. 181; 521.) Mr. Altman was plant superintendent (R. 182; 666); Mr. Carter was process supervisor (R. 181-182; 704); and Mr. Stanberry was production supervisor. (R. 182; 716.)

Clyde W. Haynes, Dave Luchsinger, Frank Marshall, Sanford Moreau and Harry A. Smith were on July 26, and for some time prior thereto, members of the CIO, employees of Petitioner and shop stewards in charge of policing the contract above referred to on behalf of the CIO. (R. 193; 255-257.)

Prior to July 26, 1945, certain matters which are of importance herein, had come to the notice of Mr. Wood and the management of Petitioner. The CIO had pledged itself not to engage in any strike or other work stoppage for the duration of the war. (R. 420-

421; 506-507.) This fact was and is in the knowledge of millions of persons throughout the United States and was known to Mr. Railey and Mr. Wood. (R. 561-562; 725.) This should be borne in mind because of the work stoppage at Petitioner's plant which is hereinafter referred to. Another fact, known to Mr. Wood as well as to thousands of persons in the State of California and elsewhere, was the strong stand taken by the CIO against racial discrimination. (R. 725-726.) Other matters were also known by Mr. Wood and the management which were not in the public knowledge. Mr. Wood knew that Messrs. Haynes, Luchsinger, Moreau and Smith had been accused of working against the established policies of the CIO for a long time, including the CIO's policy against racial discrimination, and in this connection, Mr. Wood knew that in 1944 the stewards had been taken before the grievance committee and found guilty of conduct unbecoming stewards and given a reprimand for their failure to take up the complaints of Negro members. (R. 725-726; 763-765.) Information had also come to Mr. Wood of the fact that the stewards had been accused of being remiss in carrying out their duties of office, and specifically that they had been negligent in appointing a chief steward as was apparently required by Section 10 of the contract above referred to. (R. 765.) Other information which had come to Mr. Wood with respect to the stewards was that they had failed to attend meetings of the executive council; had failed to call or refused to call a meeting of Petitioner's employees for the purpose of discussing current contract negotiations, airing

grievances of the rank and file, and electing stewards for the coming year. (R. 766-768.)

From the foregoing it may be gathered that the management of Petitioner knew prior to July 26, 1945 that the CIO had adopted certain policies which it was enforcing thoroughly, earnestly and sincerely, as well as that there was certain dissatisfaction with the manner in which the aforementioned five stewards had performed their duties and enforced the policies of the CIO.

On July 26, 1945, there occurred the first event which led to the filing of the charges here under consideration. On that date, twenty-eight to thirty employees of Petitioner, including the five stewards, held a dinner meeting. (R. 189-90; 260-261; 286-287; 382-383.) The record does not disclose whether other employees of Petitioner had cognizance of this meeting, *but it is clear that Petitioner had no knowledge thereof*, and this is admitted by the Board.

This meeting was held for the purpose of discussing working conditions at Petitioner's plant, and for the purpose of outlining plans to sever connections with the CIO and affiliating or attempting to convince Petitioner's other employees to affiliate with some other local having a strong international. (R. 189-90; 260-261; 286-287; 408-409.)

Among those present at the meeting, in addition to the five stewards, were William Sherman, a one-time business agent of the CIO, who had been defeated for reelection (R. 190; 414), Edwin Thompson, Lincoln Olsen and Harold Lonnberg. (R. 190-191;

260-261.) These gentlemen are mentioned at this point because they all played important parts in the events hereinafter narrated, and were instrumental in bringing about the work stoppage at Petitioner's plant, hereinabove mentioned.

It was determined at this dinner meeting that an interim organization be formed, pending affiliation with a local having a strong international, and it was given the name of "Colgate-Palmolive-Peet Company Employees' Welfare Association." Of the name given to this interim or stop-gap organization, Mr. Lonnberg, one of the gentlemen above referred to, had this to say: "*The title of it may seem misleading * * *.*" (R. 340.)

On July 28, 1945, pursuant to plans formulated at the dinner meeting, Frank Marshall, one of the stewards, posted notices in several of the buildings in Petitioner's plant. (R. 191-192.) These notices read as follows:

"Special meeting for all those interested in joining Employees' Welfare Association at the Finnish Brotherhood Hall, 1970 Chestnut Street, across from Burbank School, at 4:15 P. M., Monday, July 30, 1945." (R. 213.)

According to Mr. Marshall, the notices were posted by him at about 1:15 P. M., on July 28. (R. 192.) Sometime thereafter one of the notices was seen and read by Mr. Altman. (R. 667-668.) Later in the day, he received a 'phone call from Mr. Wood, and he advised Mr. Wood of the fact of the posting of the notice and of the contents thereof. Mr. Wood did not

discuss the notice or its contents with Mr. Altman (R. 668), and at the hearing testified that he imagined from what had been reported to him that the employees were perhaps getting up some sort of a welfare association for credit facilities, but did not associate it in any way with an organization set up for the purpose of collective bargaining. (R. 721-722.)

Prior to the holding of the announced meeting, Messrs. Luchsinger and Olsen saw Mr. Altman and requested that he grant a "lay-off" of two hours to the night shift employees to enable them to attend the meeting, and Mr. Altman acceded to the request. (R. 268-269.) There is nothing in the record to show that these gentlemen or any other person gave Petitioner's representatives, prior to the time that the meeting was held, any information with respect to its purpose, or that Petitioner, at that time, learned through any means the purpose thereof. The Board, nevertheless, infers that Petitioner must have learned the *true* purpose "of the proposed meeting, or it would not have agreed to shut down the plant * * * so that the employees * * * could attend". (R. 69-70.) It is submitted that not only is the Board's reasoning invalid, but also that it is not entitled to rely on this inference because it could have procured direct evidence on the point through Olsen and Luchsinger.

On July 30, 1945, at about 1:45 P. M., a few hours before the time set for the meeting (R. 667), the customary routine of Petitioner's plant was disturbed by the appearance in Mr. Altman's office of five officers of the CIO. One of the CIO officers, Mr. Paul

Heide, handed Mr. Altman a letter. (R. 668-669.) This letter, Board's "Exhibit 3" (R. 784-785) reads as follows:

"July 30, 1945.

Colgate, Palmolive, Peet Company,
6th & Carlton Streets,
Berkeley, California.

Dear Mr. Altman:

Att: Mr. C. A. Altman

This is to notify you that charges have been preferred by this Union against the following employees of your Company, and that they have been suspended from membership of this organization pending a trial as provided for in the Constitution of our Local Union:

Clyde W. Haynes, R.F.D. No. 2, Box 884, Walnut Creek, Calif.

Dave Luchsinger, 434 65th Street, Oakland.

Frank Marshall, Rt. 1, Box 241, Walnut Creek, Calif.

Sanford Moreau, 1004 Jones Street, Berkeley, Calif.

Harry A. Smith, Box 243, Rt. 6, Walnut Creek, Calif.

We, therefore, respectfully request that the above named employees of your Company be immediately removed from the job until such time as the charges against them have been determined by this organization.

Trusting that we may have your cooperation in this matter, we remain,

Very truly yours,

/s/

Paul Heide.

Paul Heide, Vice-President"

Mr. Altman was much upset by the contents of this communication and he went to Mr. Railey's office to confer with him. Thereafter, Mr. Altman returned to his office accompanied by Mr. Railey. Mr. Railey acted as spokesman for Petitioner. (R. 669-670.) The substance of what then occurred is contained in the following excerpts taken from the testimony of Mr. Railey:

"Q. Will you relate to the best of your recollection the gist or substance of that conversation?

A. We told these people that this was—came as a great surprise to us, literally a bombshell, we knew nothing about what it was about, or any reason why these men should be suspended, and protested the thing because we told them they had been loyal employees as far as we were concerned, and we had no charges against them. We were quickly reminded of our contract with the CIO which specified—which carried a paragraph to the effect that all employees must be in good standing with the union to work at our plant.

Q. Was the contract produced?

A. It was called to our attention, this particular paragraph that I refer to.

Q. Was the contract itself or a copy of the contract—

A. (interposing) A copy of the contract was read at the time.

Q. I will show you Board's Exhibit 7 and have you look at it. It purports to be a copy of a contract between the Respondent and the I.L. W.U., and see if you can pick out the clause you have reference to.

A. (Examining contract) Well, of course, I don't have reference to the number of it. I can find it.

Q. I think I will save you time and tell you it is on the first page, Mr. Railey.

A. (Indicating) That is the clause that I am referring to.

Q. Will you specify the number of the clause?

A. Section 3.

Q. You discussed that clause with the representatives of the CIO?

A. Yes, sir.

Q. Did any further conversation or discussion ensue after that?

A. These gentlemen that represented the CIO told us that these men must be discontinued immediately. They told us that they had sent a notice of their suspension to each man by registered mail, each man that was involved. They told us if we didn't discharge them they would.

Mr. Royster. I didn't get that answer, the latter part of it.

(The answer referred to was read by the reporter.)

Q. (By Mr. Hecht) What else happened, Mr. Railey?

A. It was finally agreed that we should call these five men into the office. When they came in——

Q. (Interposing) At this point you might name those five men, Mr. Railey.

A. There was Mr. —

Mr. Royster. They are in the letter.

Mr. Hecht. Yes.

The Witness. Mr. Marshall, Mr. Moreau, Mr. Haynes, Mr. Smith—May I look at this again and check my memory? (examining document) and Mr. Luchsinger.

Q. (By Mr. Hecht.) And you called them into your office?

A. We did.

Q. And what occurred then?

A. When they came to our office the CIO officials handed each of them a carbon copy of a letter which they stated had been mailed to their homes. These gentlemen looked at the letters briefly and crushed them in their hands and stuck them in their pockets and walked out of the office.

Q. No conversation between the five men?

A. No conversation.

Q. Between the five men and the CIO officials?

A. No.

Q. Any statement to you by these five men?

A. Not at the time, no. * * *'' (R. 523-525.)

* * * * *

“Q. (By Mr. Royster) Now, Mr. Railey, you testified that on July 30 you protested to the I.L.W.U. the requested suspension of these five stewards?

A. Yes.

Q. Now, how did you make that protest, what did you say?

A. Well, I couldn't tell you what I said. I can only give you a general idea of our feeling, which I can well remember, and what went on at the time. We might be classed as babes in the woods

on a thing like this, but it was something entirely new to us, and entirely unexpected, and when this letter was brought to me by Mr. Altman I admit that I was completely nonplussed. I didn't know what to do, or anything about it. At that time I didn't even recall the wording of the contract, which they maintained, and which our best advice afterwards seemed to bear out, that they had a right to suspend people, and as long as they were under suspension, or not in good standing with the Union, that they couldn't work there.

Q. Well, what did you say to the I.L.W.U. people by way of protest?

A. We told them we had no reason for discharging these people as far as we were concerned. It was brought to our attention that we had nothing to do with the matter.

Q. Did you ask them to reconsider their action at all?

A. We pleaded with them not to take action because we needed work, and we needed products, a very vital business, and there was no feeling on our part in connection with it." (R. 538-539.)

The record clearly indicates that nothing was said by anyone at this time which could have furnished information to Petitioner as to the causes underlying the suspension of the five stewards.

The record discloses that after the dismissal of the five stewards, copies of Board's "Exhibit 4" (R. 785) were distributed to Petitioner's employees. (R. 473.) This exhibit is a mimeographed notice and reads as follows:

**“ATTENTION!
ALL WAREHOUSE UNION MEMBERS:**

An illegal meeting has been called by certain employees of Peet's, now under suspension as members of this union for violation of the membership oath, and other illegal acts.

WARNING!!

Any member of Local 6 who attends such illegal meeting or participates in violations of our constitution, does so at the risk of losing membership and employment.

General Executive Board
Warehouse Union.
Local No. 6, I.L.W.U.”

There is no evidence that Petitioner had knowledge of this notice or its contents.

The meeting announced by the notices posted by Mr. Marshall was thereafter held at the time and place specified in said notices. (R. 196.) It was stipulated by the parties that a substantial majority of Petitioner's employees attended this meeting. (R. 256-257.) According to Mr. Marshall, the following matters were acted upon at the meeting:

1. The membership elected Messrs. Olsen, Sherman, Lonnberg and Thompson, as a committee of four to negotiate with Petitioner's management for the reinstatement of the five stewards. (R. 196; 848-850.)

2. The membership voted to sever relations with the I.L.W.U. and to form the employees'

welfare association, pending affiliation with a strong international. (R. 198-201; 848-850.)

Mr. Marshall also testified that the resolutions proposing the above described acts were adopted by unanimous vote of the persons present. (R. 199-200.)

The minutes of the meeting were recorded by Mr. Thompson, one of the committeemen, and are in evidence as Intervenor's Exhibit 2. (R. 468-469; 848-850.) These minutes disclose that a strike was contemplated in the event the five stewards were not reinstated, and in this connection the minutes read as follows:

“Motion that we go back to work tomorrow, pending settlement of 5 Brother Shop Stewards laid off by management at request of I.L.W.U. officials. *If shop stewards don't work, nobody works. Carried unanimously.*” (R. 849.) (Italics ours.)

The minutes further disclose that the withdrawal from the CIO was intended to be final and in all respects legal, and as to this, the following appears therein:

“Wm. Stolba, L. Olsen, Dave Luchsinger, Wm. Sherman, E. H. Thompson, following general meeting, visited an attorney for legal reasons as to best way to complete severing relations with I.L.W.U. 1-6.” (R. 849-850.) (Mr. Stolba, above named, was not a complainant in this proceeding.)

An attorney was in fact consulted and it was pursuant to his advice that certain telegrams hereinafter

mentioned were transmitted to Petitioner and to the CIO. (R. 469-470.)

It should be noted at this point that it was stipulated that all the discharged employees, with the exception of Calixto Rigo, Caetano Perreira, and Rose (Gilbert) Schneider, (a) attended the meeting of July 30, (b) concurred in the action taken at this meeting, (c) participated in the work-stoppage which began at noon, July 31, and (d) knew of the CIO's no-strike pledge. It was further stipulated that the following named employees pleaded guilty to charges made by the CIO of having participated in a wartime strike in violation of the CIO's no-strike pledge: Glenn Hixon, Martin Heppler, Thomas Azevedo, Manuel Souza, Robert Ashworth, Felix Denkowski, Vincent Barboni, Alden Lee, John Perucca, Manuel Munoz, Ann Cerrato, Rose Ros, Ina Mae Paige and Nick Tate. (R. 70; 71-72; 202-203; 258; 274; 296; 365-367; 404-405; 420-421; 506-507.)

The record also discloses that Albert Zulaica pleaded guilty to charges of violating the CIO's no-strike pledge (R. 328-329), and Intervenor Exhibit 7 (R. 867) sets forth that Caetano Perreiro and Calixto Rigo pleaded guilty to similar charges made against them.

As stated above, telegrams were prepared and transmitted for the purpose of effecting the withdrawal of the employees from the CIO. One was sent to the CIO and the other to the Petitioner. They are practically identical in wording and are dated July 30, 1945. They read as follows:

“You are hereby notified that more than 200 employees of the Colgate-Palmolive-Peet Co., *all being former members of your Union* and being more than 50% of such employees by action taken for such purpose, have and do hereby withdraw from your Union, sever connections and refuse to be further bound by any of the laws, rules or regulations of the constitution of the I.L.W.U.” (Sent to CIO; italics ours.) (R. 786.)

“You are hereby notified of action taken by more than 200 employees of Colgate-Palmolive-Peet Co. *All being former members of I.L.W.U. 1-6* and being more than 50% of total employees have withdrawn and severed relations with I.L.W.U. 1-6 as collective bargaining agent.” (Sent to Petitioner; italics ours.) (R. 786.)

The gravamen of the charge made against Petitioner is that the employees were suspended from good standing by the CIO because of activity on behalf of the AFL, and that the Petitioner knew this when it removed them from the payroll, but the foregoing makes it abundantly clear that these employees on July 30, 1945, served notice that from that date onward, they refused to maintain their membership in the CIO—such maintenance of membership being a condition precedent to employment in Petitioner's plant under the contract above referred to. It is evident, therefore, that these employees placed themselves “not in good standing” at the very outset, and this being so, it cannot be contended that the CIO suspended them because of activity on behalf of the AFL. In connection with this matter, it should be

particularly noted that none of the employees ever repudiated the action evidenced by the above quoted telegram, except perhaps the seventeen who, as appears from Intervenor's Exhibit 7, stood trial on December 17, 1945.

On July 31, 1945, the committeemen above named, armed with the authority conferred upon them by the other employees, visited Mr. Altman and requested the reinstatement of the five stewards. Mr. Altman in answer to this request stated that the stewards could not be put back to work until they had been restored to good standing with the CIO. The committeemen then left Mr. Altman and went to Mr. Railey's office. Shortly thereafter, CIO representatives called on Mr. Altman and handed him a letter, which is Petitioner's Exhibit No. 16. (R. 671-673; 846.) This letter reads as follows:

"July 31, 1945

Colgate, Palmolive, Peet Company
6th & Carlton Streets
Berkeley, California

Dear Mr. Altman: Att: Mr. C. A. Altman

This is to notify you that the employees named below have been suspended from membership in this union and are no longer members in good standing.

Pending the determination of charges which have been filed against these persons in accordance with our Constitution and By-Laws, you are requested, in accordance with our Agreement, to remove these persons from your employ

until such time as you receive word from us in regard to their status as members in this union.

Ed Thompson, 1034 Virginia Street, Berkeley, Calif.

H. Lonnberg, 1245—60th Avenue, Oakland, Calif.

Lincoln Olsen, 623 Kearney, El Cerrito, Calif.

William Sherman, 1515 Kains Avenue, Berkeley, Calif.

Your immediate attention to this request will be appreciated.

Very truly yours,

/s/ Paul Heide

Paul Heide, Vice-President."

It should be most specially noted that when the above letter was delivered to Mr. Altman, the four men named in it had already committed themselves not to maintain their membership in the CIO and to participate in a wartime strike in the event that their request for the reinstatement of the five stewards was denied.

Upon receipt of this letter, Mr. Altman went to Mr. Railey's office where he found the committeemen conferring with Mr. Railey. (R. 673-674.) The committeemen were reiterating their demand that the stewards be reinstated and advised Mr. Railey that unless these men were put back to work, *they would not be responsible for the consequences.* (R. 525-526.) Thereafter, the CIO representatives, as well as the five suspended stewards also entered Mr. Railey's office. (R. 527; 674-675.)

Mr. Lynden, President of the CIO, speaking for it, stated that the men who had been suspended would have to stand trial and if found innocent would be permitted to return to work and would be indemnified by the CIO for lost time. (R. 675.)

It is clear from the record and from Intervenor's Exhibit 6 (R. 856) that these men refused to stand trial, thus further manifesting their already announced intent not to maintain their membership in the CIO.

The Petitioner's officers made inquiry at that time as to the nature of the charges brought against the committeemen but received for answer only the statement that they were not in good standing, and would have to stand trial. (R. 675-676.) Then there occurred in the presence of Petitioner's officers a verbal exchange between the nine suspended employees and the CIO representatives—Mr. Lynden and Mr. Sherman acting as spokesmen for their respective factions. The substance of this exchange appears in the following quotation taken from Mr. Railey's testimony:

“Q. Can you relate the gist of this conversation or talk between the two men?

A. Well, to boil it down, the C.I.O. people told this negotiating committee that these people would have to stand trial on the charges against them, they could not work until those charges were disposed of, and they repeatedly reminded them, reminded this negotiating committee of the oaths that they took when they joined the C.I.O. and the consequence of a violation of those oaths,

and assured them that they had done everything they could to get increases for the employees of the Company, pointed out that the wages were frozen, nothing they could do about it, nothing that the Company could do about getting an increase. And at one stage of the meeting, the negotiating committee, without any further ado, walked out.” (R. 527-528.)

* * * * *

“Q. Yes, there was a pretty acrimonious exchange between the I.L.W.U. and the four committeemen during part of that meeting, was there not, Mr. Railey?

A. I don't know what is the right word to use for it. As I say, they were reminded of their oath, and of course, Mr. Sherman, who was speaking for the negotiating committee, accused the Union of failure to get increases for the men and for the people working there. And Mr. Lynden for the Union did bear down to the extent that they had taken an oath, and they had failed to observe it, and he pointed out what happened to a traitor for the United States, and they were a traitor to their Union, that they had the right to discipline their people. *In fact, he said—this was when the war was still on—he said they had many times been called upon to discipline people, keep them working.* And he said even in the shipyards they had been called upon to discipline people outside of working hours who were inclined to drive fast, or drink, or something like that, *to try to keep them working*, because the government said, ‘Unless you straighten your man out he can't work here.’ And it was a defense of the C.I.O. by Mr. Lynden, naturally, and their policies, and resentment on the part of Mr. Sher-

man, who was a former Business Agent, and whether he was disappointed or what I couldn't say, but at any rate, he was obviously not in sympathy with C.I.O." (*Italics ours.*) (R. 545.)

It is clear from what has been narrated before that when Mr. Lynden spoke of being "called upon to discipline people, keep them working," that Petitioner already knew that certain of its employees, including the stewards and the committeemen, had bound themselves to engage in a wartime work-stoppage violative of the CIO's no-strike pledge, and that the CIO was in possession of the facts with respect to this project, but it is also equally clear that Petitioner did not learn anything respecting the alleged malicious and illegal motivation of the CIO, on which the Board relies to support its decision and order.

The foregoing incident terminated at about 9:30 a. m., and thereafter, the nine employees, as well as the CIO representatives, left the plant at Mr. Railey's behest. (R. 528-529.) At noon of the same day, that is, July 31, 1945, the majority of Petitioner's employees left their jobs and did not return to work until August 3, 1945. (R. 257-258; 529; 677.)

During the morning of July 31st, representatives of the CIO distributed copies of the following circular in the plant. (R. 257):

“ATTENTION ALL MEMBERS
I.L.W.U. No. 6

EMPLOYED AT COLGATE, PALMOLIVE, PEET COMPANY
LOOK BEFORE YOU LEAP

Because of a constant campaign of misinformation and falsehoods carried on by Sherman-Marshall-Lundeberg & Co., many otherwise reliable members of our Union are being misled down a blind alley, and into action that can only result in losses and hardship for the membership involved. The unscrupulous people who are attempting to promote strike action at this plant are *traitors* to our Union membership, our flag and our country! All members who join with them are jeopardizing their own *reputation*, their *Union* standing, their *seniority* and their *jobs*! Any strike at plant will bring an *immediate* directive from the Regional War Labor Board to return to work—and will resolve *no* issues—fancied or otherwise!

So that all members may understand the *true* situation, the following is a copy of agreement extending the provisions of the Union contract, including the requirement that *only members of Warehouse Union, Local No. 6, I.L.W.U., in good standing* may be employed by the company, it will be enforced by the entire membership of our Union, if it becomes necessary.” (R. 789-790.)

It will be noted that although this circular by its terms described the “unscrupulous” persons who were “attempting to promote strike action” as “traitors” to the “Union membership, our flag and our country”, that the Board has misdescribed it merely as a

“warning” to the “employees that they might lose their jobs by assisting the CIO ‘traitors’ ”. (R. 71.) The unfairness of this misdescription is made obvious by the fact that the Board fails to mention the fact that the “warning” was directed against participation in the strike. On the other hand, the fact of the CIO’s ample justification for issuing this “warning” must be conceded when the terms of its pledge against wartime strikes are considered. In substance, this pledge stated the following:

“On behalf of the entire membership of the International Longshoremen’s & Warehousemen’s Union we renew and give to President Harry S. Truman and the nation our solemn pledge that until the war is ended, with the unconditional surrender of Japan, we will not strike, stop work, or cease or slow production for any reason whatsoever.

“We reiterate that this is an unconditional pledge given in the knowledge that our first duty is to our nation, and that despite provocation we must take no action that will imperil our nation or cause the prolongation of the war, or cause the unnecessary loss of so much as one Allied life.

“We further make the positive pledge that we will do everything in our power to shorten the war by lending ourselves to intelligent solution of the manifold manpower problems and to the development of all possible means to speed production.” (R. 420-421.)

We believe that this Court has judicial knowledge of the fact that the great majority in this country

shared the CIO's conviction that no action should be taken that would "imperil our nation or cause the prolongation of the war, or cause the unnecessary loss of so such as one Allied life."

In connection with the foregoing it should be specially noted at this point that loss of membership and jobs was threatened not because of activity on behalf of another labor organization, but because of participation in an unauthorized strike. Thus, ample warning against this action was given all employees, including those who participated in the work-stoppage in disregard thereof and were eventually discharged for this reason.

On the afternoon of July 31, 1945, Mr. Railey at the request of Mr. Thompson, attended a meeting at the Finnish Hall. There, Mr. Railey was again requested to reinstate the suspended employees and after some discussion he refused to do so on the ground that under the closed shop provision of the contract, the Petitioner was unable to do so until the men had been restored to good standing. (R. 529-531.)

After Mr. Railey left, those present at the meeting reaffirmed their vote not to return to work until the stewards were reinstated and the meeting was recessed and thereafter resumed on the evening of August 2. (R. 258.)

On August 2, a motion was approved dissolving Colgate-Palmolive-Peet Co. Welfare Association and to affiliate with the A.F.L. A further motion to return to work was also adopted at this meeting. (R. 258.)

On August 3, 1945, as above related, Petitioner's employees returned to work with the exception of the five stewards and the four committeemen. (R. 258.) It was also on August 3, 1945 that the A.F.L. filed a petition with the Board seeking certification as bargaining representative for Petitioner's employees. (R. 549.) Notice of the filing of this petition came to the knowledge of Petitioner's management on or about August 8, 1945. (R. 549.)

Mr. Wood in charge of Petitioner's labor relations returned to Berkeley on August 1, 1945, while the strike was still in progress. (R. 724-725.) He had been fully informed by Mr. Railey as to the events which preceded the strike, and had formed an opinion, though not a definite one, as to the probable cause for the suspension of the five stewards and based this opinion on information he had respecting the CIO no-strike pledge and the stewards' reported failure to enforce the anti-discrimination policy of the CIO. (R. 725.) The knowledge Petitioner's management had respecting the probable causes of the suspension of the five stewards and committeemen was further supplemented by news reports which appeared in the local press during the period of the strike. These reports appear to have featured the issue of racial discrimination. (R. 533; 677-678.)

Petitioner's management did not rely solely on the interpretation given by the CIO representatives respecting the rights and liabilities of the parties under Section 3 of the collective bargaining agreement. Mr. Wood returned to the plant on August 1, 1945 and by

that time, Mr. Railey had already consulted and obtained from Petitioner's attorneys an opinion on this section of the contract. This opinion advised the management that Petitioner had to comply strictly with the terms of the section and that Petitioner could not take upon itself the prerogative of passing upon the merits of the action taken by the CIO in suspending the stewards and the committeemen. Mr. Wood testified that Petitioner acted in accordance with the advice received from counsel. (R. 726-727.)

On August 14, 1945, the Board gave notice of hearing of the AFL's petition for certification, and this notice was received by the Petitioner on August 17, 1945. (R. 549.)

The first unfair labor practices charge preferred by the AFL against Petitioner was filed with the Board on August 14, 1945. (R. 92-93.) The charge set forth that Petitioner was engaging in unfair labor practices, within the meaning of the National Labor Relations Act, in that it had terminated the employment of the five stewards and the four committeemen, "*because of their refusal to adhere to policies of*" the CIO. (R. 92-93.)

On August 17th the five stewards and the four committeemen applied to Petitioner for reemployment. Mr. Wood, acting for Petitioner, rejected their application. (R. 728.)

When this application for reemployment was made, the nine men involved had not repudiated their refusal to maintain their membership in the CIO.

We deem it appropriate, at this point, to call attention to the conclusion drawn by the Board from the charge filed by the AFL against the Petitioner, and from the Petitioner's refusal to reinstate the stewards and the committeemen. The Board said:

“* * *, the respondent, when it refused the reinstatement application of these two groups of discharged employees on August 17, 1945, *was clearly apprised of the nature of the dismissals by the formal charges of discrimination which the A. F. of L. had filed with the Board.*” (R. 77-78.) (Italics ours.)

It is hard to imagine how the Board concludes that the Petitioner was “clearly apprised” of the nature of the dismissals by a charge that stated that the men were discharged “because of their refusal to adhere to policies” of the CIO. The most that Petitioner could gather from this statement is that the employees had lost standing because of their failure to adhere to the CIO's policy against war-time strikes. It is, therefore, submitted that the Board's conclusion would have been infinitely more accurate had it stated that Petitioner learned nothing with respect to the alleged motivation of the CIO from the contents of the charge.

On September 1, 1945, representatives of the CIO posted themselves outside of Petitioner's plant, prior to the start of operations, and engaged in what appears to have been a mass checking of dues' books. (R. 709-712.) The record shows that there was a custom of many years standing which permitted CIO

representatives to check dues' books and collect dues at Petitioner's plant.

On the day prior to the dues' checking incident, to-wit, August 31, 1945, Mr. Gleichman, a CIO representative, came to Mr. Wood requesting the suspension of a long list of employees *and stated in support of his request that the persons involved were in bad standing, that some of them had not paid their dues and that others were not members of the CIO.* Mr. Wood refused to accede to this request and took the matter up with Mr. Heide, another CIO official. (R. 728-732.)

On the day following the dues' checking incident, that is, September 1, 1945, Mr. Altman received a letter from the CIO, which is Board Exhibit No. 10. (R. 792-793.) This letter reads as follows:

"September 1, 1945

Colgate-Palmolive-Peet Company,
6th & Carlton Streets
Berkeley, California.

Dear Mr. Altman:— Att: Mr. C. A. Altman

This is to notify you that the employees named below have been suspended from membership in this Union and are no longer members in good standing.

Pending the determination of charges which have been filed against these persons in accordance with our Constitution and By-Laws, you are requested, in accordance with our Agreement, to remove these persons from your employ until such

time as you receive word from us in regard to their status as members in this Union.

Rose Ross	Martin Heppler
Esther Young	Bill Howard
Ina M. Paige	Glen Hixon
Ophelia Reyes	Alden Lee
Kay Norris	Al Barboni
Ann Cerrato	Felix Denkowski
Henry Giannarelli	A. L. Richards
Manuel Souza	Terry Anderson
Albert Zulaica	K. Periera
Mike Ramirez	

Your immediate attention to this request will be appreciated.

Yours very truly,
/s/ Paul Heide

Paul Heide, Vice-President"

Mr. Altman advised Mr. Wood of the receipt of this letter and he in turn informed Mr. Railey. (R. 732-733.) The events which followed the receipt of this letter were related by Mr. Wood as follows:

"I * * * came down to the plant and found Mr. Railey in his office when I got there. I was showed the letter and we discussed the procedure we should follow to let out such a large group of men.

Mr. Railey wanted to soften the blow as much as possible. A lot of them had been there a long time and he did not like them to think we were throwing them out without any consideration. So it was decided that we would call them into his office. And Mr. Altman took the responsibility of having all these people notified that they should

come down. It took some little time to gather them. But after they got there, why we showed them the letter and told them that we were very sorry but under the terms of our contract we had no alternative except to abide by its terms.” (R. 733-734.)

Prior to the dismissal of the persons named in Exhibit 10, Mr. Wood made inquiry from Mr. Heide as to the reasons why they were being placed in bad standing and he testified that the only answer he got in response to this inquiry was that these persons had violated their oath, the Constitution and By-Laws. (R. 736.)

As late as September 15, 1945, Mr. Wood had been unable to form a definite opinion as to the reasons underlying the suspension of these persons and in this connection he testified as follows:

“Q. All right. On September 1, 1945, or let us even carry it further, September 15, 1945, had you, Mr. Wood, formed any definite opinion for the reason why these men were being put in bad standing by the union?

A. No, I hadn't. I was somewhat bewildered.

Q. What was the reason for your bewilderment?

A. Well, I didn't think that it was only for union activities alone, because many people had not been disturbed that I had observed wearing buttons and passing out literature.

Trial Examiner Ruckel. What kind of buttons and what kind of literature?

The Witness. The A. F. of L. buttons.

Q. (By Mr. Hecht) Are some of those persons still in your employ, Mr. Wood?

A. They are." (R. 736-737.)

* * * * *

"Q. (By Mr. Hecht) Did those persons, Mr. Wood, to whom you have reference, continue to wear the A. F. of L. button and pass out the A. F. of L. literature up to and including the date of the election?

A. They did, sir.

Q. Are those persons still in your employ?

A. They are." (R. 738.)

On September 26, 1945, a decision and direction of election was issued by the Board and on October 16, 1945 an election, pursuant to the decision and direction of election, was conducted among Petitioner's employees. (R. 549.) At this election the majority of votes was cast in favor of the CIO. (R. 550.)

Some time in November, 1945, Mr. Wood was informed by George Squires, one of the CIO stewards, that the five stewards and the four committeemen had refused to stand trial; had been tried *in absentia*, found guilty and expelled on charges of dereliction of duty, failure to enforce the anti-discrimination policy and participating in a strike during the war. (R. 741-742.) In early January, 1946, Mr. Wood acquired knowledge from the CIO stewards, and the CIO publication, "The Dispatcher", as to the status of the other complainants. He learned that some had pleaded guilty to the charge of participating in a strike and were on probation, and others had refused to stand trial on the same charge, but, nevertheless, had been tried *in absentia* and expelled. (R. 742-743.)

In addition to the information obtained from the stewards and "The Dispatcher", Mr. Wood had also received copies of the written decisions of the CIO trial committees before whom the employees had been tried. (R. 762.) These decisions are in evidence as Intervenor's Exhibits Nos. 6 (R. 856) and 7. (R. 867.)

The following extract taken from Intervenor's Exhibit 6 establishes that Petitioner's management would have been most ill-advised if it had attempted to determine for itself, in the absence of a full dress inquiry into the internal affairs of the CIO, the causes underlying the suspension of complainants:

"One thing we want to make very clear. We do not hold it against these men, or any of the other defendants, that they apparently joined the A. F. of L. Chemical Workers Union. If they thought the men could get a better deal through the A. F. of L., that was their right under the Wagner Act, as we understand it, just as A. F. of L. members have the right to change to the CIO if they want to. After all, that is a question for the rank and file to decide. Undermining union policies is something else. Policies such as political action, equal rights for all races and colors, and the war-time no-strike pledge are fundamental to the welfare of the union and its members. The union cannot and should not tolerate such conduct." (R. 865-866.)

It is submitted that the record herein shows a situation where the *admitted* participation by the discharged employees in an "outlaw" strike furnished the CIO with valid grounds and good cause to suspend

or expel them from membership, and to validly invoke the closed shop provisions of the collective bargaining agreement. We submit that the malicious motivation of the CIO, even if it had been proven, does not, under established law, convert the enforcement of its legal rights into an unlawful act, and that, therefore, the issue of the CIO's motivation is a false one.

ASSIGNMENTS AND SPECIFICATIONS OF ERROR.

1. The Board erred in its refusal to dismiss the complaint, because there is no evidence to establish a violation of Section 8(1)(3) of the National Labor Relations Act.

(This assignment depends for its validity on assignments 2 to 10 below.)

2. The Board erred in its decision and order, in that it thereby construed the National Labor Relations Act as giving it power to prohibit the coercion of employees by other employees or labor organizations.

(This assignment discussed, *infra*, pp. 58-84.)

3. The Board erred in its decision and order, in that it thereby construed the National Labor Relations Act as giving it power to find a labor organization guilty of unfair labor practices and to regulate the affairs of such labor organization.

(This assignment discussed, *infra*, pp. 58-84.)

4. The Board erred in its decision and order, in that it thereby has construed the National Labor Rela-

tions Act as permitting it to define and punish the unfair labor practices of labor organizations.

(This assignment discussed, *infra*, pp. 58-84.)

5. The Board erred in its decision and order, in that it has so construed the National Labor Relations Act as to empower it to prohibit the performance of an admittedly valid "closed shop" contract because of alleged unfair labor practices committed by the contracting union.

(This assignment discussed, *infra*, pp. 58-84.)

6. The Board erred in its decision and order in finding and concluding that the CIO's alleged unfair or malicious motivation deprives it of the legal right to discipline its members because of a plain and clear violation of its policies.

(This assignment discussed, *infra*, pp. 85-91.)

7. The Board erred in its decision and order in finding that the Petitioner had a legal right and obligation to refuse to perform an admittedly valid "closed shop" contract, because it allegedly knew the CIO's allegedly malicious motivation in requesting the discharge of employees under the terms of said "closed shop" contract.

(This assignment discussed, *infra*, pp. 76-80.)

8. The Board erred in its decision and order because there is not sufficient proof of the CIO's alleged unfair or malicious motivation in requesting the discharge of the employees pursuant to the terms of the "closed shop" contract.

(This assignment discussed, *infra*, pp. 91-123.)

9. The Board erred in its decision and order because there is no proof that the Petitioner knew that the CIO had requested the discharge of the employees because of their anti-CIO activity.

(This assignment discussed, *infra*, pp. 91-123.)

10. The Board erred in its decision and order because there is no proof that the Petitioner made no bona fide effort to evaluate the evidence before it, and in failing to determine, as did the Board, that the CIO was motivated by a desire to punish the employees because of their anti-CIO activity when it requested their discharge.

(This assignment discussed, *infra*, pp. 91-123.)

11. The Board erred in its decision and order, in that said order deprives the Petitioner of property without due process of law, inasmuch as Petitioner is called upon under the terms of said order to make whole the discharged employees for any loss of pay they have suffered since the termination of their employment, and deprives Petitioner of its property rights and privileges accruing to it under its contract, contrary to the Fifth Amendment to the Constitution of the United States.

(This assignment depends for its validity on assignments 2 to 10 above.)

ARGUMENT.

1. **THE PETITIONER WAS ENTITLED TO A DISMISSAL OF THE COMPLAINT BECAUSE THE NATIONAL LABOR RELATIONS ACT DID NOT PROHIBIT THE COERCION OF EMPLOYEES BY LABOR ORGANIZATIONS, AND THEREUNDER A LABOR ORGANIZATION COULD LAWFULLY REQUIRE THE PERFORMANCE OF A "CLOSED SHOP" CONTRACT EVEN THOUGH SUCH PERFORMANCE RESULTED IN THE COERCION OF EMPLOYEES.**

Petitioner's reasons for requesting the Court to reconsider the question resolved by it in the case of *Local 2880, etc., v. N.L.R.B.*, 158 Fed. (2d) 365.

The argument above summarized was rejected and held invalid by this Honorable Court in *Local 2880, etc. v. N.L.R.B.* (1946), 158 Fed. (2d) 365 (cert. granted; 331 U.S. 798, 91 L. Ed. 1077). On the other hand the Circuit Court for the Seventh Circuit, in *Aluminum Co. v. N.L.R.B.* (1946), 159 Fed. (2d) 523, accepted this argument and held it valid. It had been hoped that the conflict created by these two decisions would be resolved by the Supreme Court of the United States in its expected review of *Local 2880, etc. v. N.L.R.B.*, *supra*; however, this expectation cannot be realized because Local 2880's petition for certiorari was dismissed, at its request, on January 5, 1948, and the case has been removed from the calendar of the Supreme Court.

The Supreme Court's failure to resolve this conflict and the necessity of protecting the record, compel us to raise this question and to respectfully request the further consideration thereof by this Court.

In our study of this Court's opinion in *Local 2880, etc. v. N.L.R.B.*, *supra*, we note that the Court did

not discuss or mention the pertinent Congressional reports which accompanied the adoption of the National Labor Relations Act. We feel that these reports militate against the position taken by the Board on this question of law. Therefore, our discussion of this point will concern itself for the most part with the history of the Act and these reports.

Statement of Board's argument in support of its right, under the National Labor Relations Act, to declare unions ineligible to be parties to "closed shop" contracts.

This Court has stated the position of the Board on this question as follows:

"The Board's construction of the proviso of Section 8(3) with relation to Section 7 conferring on * * * all employees the right 'to bargain collectively through representatives of their own choosing' as not warranting a discharge for activities at an election for such choice is obviously rational * * *" (158 Fed. (2d) at 368.)

The reasoning of this Court in upholding the views of the Board is, we think, set out in the following portions of the opinion:

"However, we are of the opinion that it is the only interpretation to be given the proviso of Section 8(3) for closed shop contracts. Such contracts are generally drawn, as here, in anticipation that during their currency there will be elections at which the employees will be given their opportunity to choose the bargaining agent through whom, as provided in Section 7, they will 'bargain collectively' with their employers. If they are to exercise this right under Section 7 *in*

terrorem of discharge, because its exercise may displease the union successful at the election, that 'labor organization' will be 'assisted by * * * action defined in * * * Section 8(1) as an unfair labor practice' in violation of the express language of the proviso." (158 Fed. (2d) 368.) (*Italics ours.*)

* * * * *

"We construe the discharge provision of the instant closed shop contract as not intended to include an obligation on the employer to discharge an employee for the exercise of the latter's right to seek at an election of his bargaining agent a labor organization other than the one having an existent closed shop contract. If the union is so organized that exercising such right at the election prevents an employee, otherwise complying with the union's membership requirements, from remaining in the membership—that is, if the union is organized so to compel the closed shop employer to commit an unfair labor practice—*such a union is ineligible to become a party to a closed shop contract* under the provisions of Section 8(3)." (158 Fed. (2d) 369.) (*Italics ours.*)

* * * * *

"The contention is unwarrantable. The petitioner does not deny that the employee is so held in *terrorem* of violation of the union's requirements of its members. Such fear is obvious and Congress well may be presumed to have recognized its existence as a factor in making effective all proper closed shop contracts. Because it is an effective factor as to all the legal incidents of a closed shop contract nonetheless makes such fear a factor in a union's wrongful attempt to defeat the Congressional purpose to democratize the em-

ployees' organization by a free election of their bargaining agent." (158 Fed. (2d) 370; Opinion on Petition for Rehearing.)

We understand from the foregoing the Board's argument, reduced to the simplest terms, to be as follows:

A labor organization which so coerces an employee as to cause him to exercise the rights guaranteed by Section 7 *in terrorem of discharge*, is ineligible to become or remain a party to a closed shop contract, and a discharge by the employer pursuant to a closed shop contract vitiated by the ineligibility of the coercing union is assistance of the type defined by the Act as an unfair labor practice. We also understand from this that it is immaterial in the Court's view whether the vitiating conduct occurs before or after the execution of the closed shop agreement.

Major premise of Board's argument depends for its validity on the truth of the assumed proposition that the coercion of employees by unions has been prohibited by Congress.

In our opinion the Board's argument depends for its validity on the proposition that a labor organization which coerces employees "is ineligible to become a party to a closed shop contract", and this premise itself depends for validity upon the further assumed proposition that Congress intended to make illegal the coercion of employees by other employees or labor organizations. In other words, the Board's right to declare the ineligibility of a union and to deprive it of its contract must be predicated on the assumption that the coercion of employees by labor organizations

offends against some mandate of Congress; otherwise this would be deprivation of property without reason or cause. We say that this is an "assumed" premise, because there is nothing in the express language of the National Labor Relations Act which declares that employees are afforded protection thereunder against interference from persons other than employers or those acting on their behalf. The only unfair labor practices denounced and defined by express language in the Act are those committed by employers. The Court, therefore, no doubt had this implied or assumed premise in mind when it stated that "Congress well may be presumed to have recognized" the existence of fear induced by union coercion as a factor in making effective closed shop contracts. (158 Fed. (2d) 370.) The Court's statement is a correct one, but there is no necessity of presuming that Congress recognized this factor because Congress did in fact expressly recognize it. However, Congress, in expressly recognizing the fear factor induced by union coercion, also expressly declared that it did not intend to and would not make any provision in the National Labor Relations Act to protect employees from such coercion and from the fear thereby induced.

The premises of the Board's argument are false, because Congress expressly stated that it did not intend to prohibit the coercion of employees by unions or to provide for the regulation of unions.

No clearer statement of Congressional purpose not to forbid coercion of employees by employers or labor organizations is to be found than in the express lan-

guage of the Congressional reports which accompanied the adoption of the National Labor Relations Act. We refer the Court in this connection to the following taken from these reports:

“Regulation of employees and labor organizations is no more germane to the purpose of this bill than would be the regulation of employers and employer associations in connection with the organization of employers in trade associations.

There is an even more important reason why there should be no insertion in the bill of any provision against coercion of employees by employees or labor organizations; courts have held a great variety of activities to constitute ‘coercion’; a threat to strike, a refusal to work on material of non-union manufacture, circularization of banners and publications, picketing, even peaceful persuasion. In some courts closed shop agreements or strikes for such agreements are condemned as ‘coercive’; thus, to prohibit employees from coercing their own side would not merely outlaw the undesirable activities which the word connotes to the layman, but would raise in federal law the ghosts of many much-criticized injunctions issued by courts of equity against activities of labor organizations—ghosts which it was supposed Congress had laid low in the Norris - LaGuardia Act.” (Italics ours.) See Senate Reports, Vol. 9877, 74th Congress, First Session, R. 573, to accompany S. 958, May 2, 1935, at page 16.

For the Board to declare a union ineligible to become party to a “closed shop” contract and to deprive it of its contract is, in effect, *regulation* by the Board

of labor organizations, and such *regulation* of labor organizations, the above Congressional report tells us, is not "germane to the purposes of" the National Labor Relations Act. To prohibit the performance of a "closed shop" contract because it results in the coercion of employees by labor organizations, is in effect, "to prohibit" employees and unions "from coercing their own side," and this prohibition, it is clear, was not the intent or purpose of Congress. Congress having *expressly* and emphatically declared that it did not intend to regulate unions, and having *expressly* defined and denounced in the Act itself *only* the unfair labor practices of employers, there is, we submit, no excuse, reason or cause for implying, presuming or assuming such a regulation or such a prohibition.

It is clear, therefore, that in coercing its own side a union did not, prior to the enactment of the Taft-Hartley Act, indulge in culpable conduct, violative of any Congressional mandate. Accordingly, it is respectfully submitted that the major premise of the Board's argument on this question of law is false, and that therefore this Court is not required, in this instance, to accept the "experienced judgment" of the Board.

It is also clear that since such conduct is not culpable that there is no cause or reason for declaring the ineligibility of a union as a party to a "closed shop" contract and to deprive it of its contractual rights. This being so, it follows that the second or minor premise of the Board's argument is also false.

It is likewise patent, that if there has been no vitiating conduct that when a discharge is made by an employer pursuant to a "closed shop" contract, a labor organization *is not*, as the Board concludes, " 'assisted by * * * action defined in (Section 8(1) as an unfair labor practice' in violation of the express language of the proviso" of Section 8(3).

Moreover, if there has been no assistance given to the union by the employer through any unfair labor practice, the contract is valid under the proviso and both the union and employer may insist on its performance.

The background of the Wagner Act and the reasons for its one-sided and defective approach to the problem sought to be resolved.

We submit in the light of the foregoing that the "Congressional purpose to democratize the employees' organization by a free election of their bargaining agent", mentioned by this Court, was, the Congress decided, to be implemented by elections *free from employer interference*, not elections free from union coercion, and this one-sided treatment of an old problem was the basic and the much criticized defect of the Wagner Act. The "one-sidedness" of the Act has long been recognized.

"An additional reason constantly assigned for opposition to the act is its alleged one-sidedness in providing for unfair labor practices committable by employers without also providing for like employee unfair labor practices. Insistence upon this point has induced the legislatures of the

states of Massachusetts, Michigan, Minnesota, Pennsylvania and Wisconsin to provide for unfair labor practices committable by employees. Proponents of the act on the other hand have argued against the contention that the act is unfair because one-sided. The answer of the Act's proponents appears to be a twofold one. In the first place it is asserted that the common law and statute law of the several states and the Federal government are now adequate to deal with unlawful activities carried on by labor. In the law of torts, crimes and in the labor injunction along the various other legal sanctions are found adequate weapons to deal with labor activities which transcend the boundaries of legality."

Labor Disputes and Collective Bargaining (1940), *Teller*, Volume Two, Section 244, p. 695.

The problems and abuses which were to result from this defect were not then foreseeable. It is common knowledge that when the Act was drafted and adopted, that the schism in the labor movement, which culminated in open warfare between the AFL and CIO, had not occurred and was not anticipated. Therefore, Congress had no reason to provide in the Wagner Act a remedy to cure evils which might arise as a result of the then not anticipated breach in the ranks of labor. At the time this legislation was enacted it was anticipated that the contest would be only between organized labor, on the one side, and employers, nonunion employees and company dominated "employee representation plans", masquerad-

ing in the guise of so-called "independent unions", on the other. Therefore, employees were under this Act not to be free to remain unorganized or free from concerted union activities to organize them. The freedom or democratization intended was only freedom from employer autocracy. Those who drafted the Wagner Act knew, as the above quoted report discloses, that employers had been only too anxious to outlaw the "closed shop" contract as coercive, and too prone to attempt to defeat the organization of their employees by pretending to be protagonists of the nonunion man's right to remain unorganized. The right of the nonunion employee, usually championed by his employer, to remain unorganized, has been generally held to be, and to present a false or meritricious issue.

"Invoking section 8(3) of the National Labor Relations Act instead of sections 921 and 923 of the California Labor Code in support of the trial court's injunction, plaintiff seeks to revive an issue settled by this court in *McKay v. Retail etc. Union No. 1067*, 16 Cal. 2d 311 (106 P. 2d 373); *Shafer v. Registered Pharmacists Union*, 16 Cal. 2d 379 (106 P. 2d 403), and *C. S. Smith Met. Market Co. v. Lyons*, 16 Cal. 2d 389 (106 P. 2d 414). It was there contended that the concerted activities were unlawful on the ground that their purpose was to compel the employer to violate sections 921 and 923 of the California Labor Code which, like the National Labor Relations Act, gives employees the right of association, self-organization, and designation of representatives free from the interference of employers. In rejecting this contention in *Shafer v. Registered*

Pharmacists Union, supra, the court stated: 'The argument is * * * made that it is absurd to suppose that these provisions were written with the intention of restraining the employer from influencing his employee, while at the same time conferring upon other individuals the right "to coerce" the same employee through the employer. But the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain "unorganized" and using the term adopted by the appellants to designate the economic pressure applied against them through the employer, coercion may include compulsion brought about entirely by moral force. Certainly such compulsion is not made contrary to public policy by any statute of this state and is a proper exercise of labor's rights.' "

* * * * *

"The dilemma in these cases arises from a failure to understand that the basic conflict is between the union and nonunion workers. Until that conflict is resolved, the employer is in the unhappy position of a neutral suffering its repercussions. When he seeks to enjoin concerted union activities for a closed shop on the ground that their purpose is to drive him to unlawful interference with his nonunion employees, he is in fact seeking to translate a conflict between groups of workers in which union workers have an even chance of achieving their objective lawfully, into a conflict in which he would become the contestant *ad hoc* for the nonunion workers, armed with a formula that would make the very objective of the union workers unlawful. *The real issue of the closed shop would thus be shunted off the field to be*

replaced by the meretricious issue of the non-union workers' right to freedom from employer interference. That right, evaluated within the context of the right of workers and unions to take concerted action for a closed shop, does not include the right to freedom from the risk of employer interference induced by the pressure of such action. Employees are not free from concerted union activities to organize them directly; they are free to resist such activities." (Italics ours.)

Park & T. I. Corp. v. Int. etc. of Teamsters
(1946), 27 Cal. (2d) 599 at 609-612, 165 Pac.
(2d) 891, at 897-899.

The struggle between the CIO and AFL, engendered, as this Court knows, many abuses, including the denial of the democratic processes in unions to rank and file members. Organizations on both sides made frequent use of "closed shop" contracts to obtain the discharge of dissident employees for the purpose of perpetuating themselves in power.

The Ansley case. The Board recognizes that the Act does not prohibit the coercion of employees by unions.

The problem created by this abuse of the "closed shop" contract first received full consideration by the Board in *Ansley Radio Corp.* (1939), 18 N.L.R.B. 1028, some five years after the adoption of the Wagner Act. There the Board, fully aware of the purpose and history of the Act, determined in strict accordance with the express terms thereof and with the clear and express declaration of purpose contained in the congressional reports, that the contracting union

could invoke the "closed shop" provisions of the contract to secure the discharge of dissident members advocating another organization as the bargaining representative. In making this holding the Board gave express consideration to the history of the Act, and in so doing, stated the following:

"The freedom guaranteed employees under the Act to form, join, and assist labor organizations and to bargain collectively through representatives of their own choosing, without economic or other compulsion by the employer, is qualified by the proviso clause of Section 8(3). The legislative history of this clause as well as its language shows that its purpose was to leave undisturbed by the Act, except in two instances, a form of industrial relationship which had won increasing acceptance by employers and had found widening approval in the law of the several States. The legislative intent and policy were to withhold what rights individual employees otherwise might have had under the Act but for the proviso in order to permit organized labor to seek and enter into this relationship where the employer was willing to do so and local law offered no obstacle."

* * * * *

"The proviso clause declares that 'nothing in this Act' shall preclude an employer from 'making' a closed-shop agreement with a labor organization 'if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.' Although the proviso relates specifically only to the *making* of the agreement, the necessary implication is that the employer is protected against a charge of discrimination under Section

8(3) in *carrying out* the closed-shop agreement as made, at least where, as here, the agreement is for a reasonable period of time.” (*Ansley Radio Corp., supra*, 18 N.L.R.B. 1059-1061.)

The Act’s failure to prohibit the coercion of employees by unions resulted in the recognition of the necessity of congressional intervention to democratize employees’ organizations.

The abuse sanctioned by the Act and recognized by the Board in its above quoted opinion, developed to such proportions that many proposals to amend the Act were made by students of labor and its problems. One of many such proposals was made by Ludwig Teller in his work, “A Labor Policy for America.” (Baker, Voorhis & Company, Inc.; 1945.) The Wagner Act’s defects and its limited purpose is stated as follows by Mr. Teller:

“It never hurts to reiterate that the Wagner Act is not a full blown labor relations statute. *It deals with only one segment of labor policy. Its limited purposes are to protect employees against employer interference with their right to form and join labor unions, and to encourage collective bargaining between employers and bargaining agents representing a majority of employees in an appropriate bargaining unit.*” (Italics ours.)

A Labor Policy for America, pp. 36-37.

Among the specific recommendations made by Mr. Teller to cure or mitigate this evil was one which would make it an unfair labor practice to:

“(1) to deny a person membership in its organization, or to discriminate against any of its members, whether directly or indirectly, by reason

of his race, color or creed, national origin or political beliefs;

(2) to deny to any of its members any rights secured to him by its constitution and by-laws;

(3) to deny to any member the right to free discussion within the union, or to punish any member for exercising such right;

(4) to deny to any of its members the right to a fair and full hearing on all charges made against him, before persons other than those bringing the charges. In the case of appeal by any member to a higher body within the organization, such appeal shall be heard by a body separate from and independent of any person or body connected with the charges or any hearings on the charges."

A Labor Policy for America, p. 152.

These proposed unfair labor practices of unions were intended to effectuate legislation which had been advocated by the American Civil Liberties Union as early as 1943. The specific proposal of the Civil Liberties Union and the reasons underlying it are fully set forth in its publication "Democracy in Trade Union", and is referred to therein as "A 'Bill of Rights' for union members". (*Democracy in Trade Unions*, p. 68.)

Mr. Teller would also have made it an unfair labor practice on the part of the employer to discharge an employee pursuant to a "closed shop" provision unless there were first fulfilled certain conditions precedent. Mr. Teller's proposal was as follows:

“It should be an unfair labor practice for an employer, pursuant to a union security provision contained in a collective agreement, to discharge or otherwise to subject an employee to any disability in regard to the terms and conditions of his employment, unless the contracting union has certified to the employer in writing that the employee in question has finally exhausted his remedies within the union. The proposed Labor Court should have jurisdiction over cases of alleged improper expulsion from labor unions.”

A Labor Policy for America, p. 168.

It is interesting to note that in making this proposal the author states: “The suggested unfair labor practice is designed to perfect a defect *in existing law*.” (Italics ours.)

Only another example of the recognition of this defect will suffice to make it clear that very few persons outside of the Board failed to recognize it.

“Labor unions are, of course, human institutions and are thus subject to the vices as well as the virtues of their leaders. In that respect, the closed shop presents the same dangers that are inherent in the concentration of power in the hands of officers of any institution—political, economic, or social. But it is obvious that the danger is much more minatory when the power is held by union officials who, through the usurpation of power of voluntary associations, may almost at will refuse membership to some workers or rescind it from others. In either case, under such abuses of the closed shop principle, the result is to deprive a man of the opportunity to earn his living. *Therefore, in order to safeguard that*

opportunity, while at the same time permitting the proper functioning of the closed shop, two important provisions are needed: (1) every union must be open generally to qualified workers on reasonable and non-discriminatory terms; and (2) workers who have been refused membership and those who have been suspended or expelled from a union should be permitted to appeal their cases to an impartial chairman or a labor board.

With these safeguards established to protect labor against exceptional abuses of power by some irresponsible union leaders, the natural 'God-given' right to work would be adequately protected." (Italics ours.)

"*The Closed Shop*" (1944), Toner, Amer. Council on Public Affairs, Washington, D. C., pp. 191-192.

The Rutland case. Legislation by the Board.

After the *Ansley* decision, we find that while such staunch friends of labor as the American Civil Liberties Union were specifically advocating legislation to "democratize the employees' organizations", organized labor itself and the Board, its most eminent and powerful protagonist, stubbornly refused to acknowledge the obvious necessity for changes in the Act.

Some years after the *Ansley* case, the Board abandoned the logical position there declared, and announced in its decision in *Rutland Court Owners, Inc.* (1942), 44 N.L.R.B. 587, the policy and argument which it has applied to the instant case, and in the case of *Local 2880, etc. v. N. L. R. B., supra*. This

policy and this argument were an obvious makeshift and an expedient adopted to avoid admitting the necessity of congressional intervention to remedy the chaotic condition created by disputes between the two great labor organizations.

The policy announced in the *Rutland* case was criticized and vigorously denounced as a usurpation of congressional power *in*, and outside, the Board. Board member Leiserson, dissenting in that case, said:

“There is no contention in this proceeding that the closed-shop contract of 1939 is invalid. The discharges were made pursuant to the terms of that contract and are therefore within the terms of the proviso to Section 8(3) of the Act. To reach a contrary result the majority has in effect assumed authority to suspend enforcement of the provisions of a valid collective bargaining agreement although this Board has previously held that it was not permitted to do so. *If valid closed-shop contracts, which are expressly permitted by the Act, have undesirable effects, it is for the Congress, and not for the Board, to make the modifications.* I would dismiss the complaint.”

Rutland Court Owners, supra, at p. 603.

Outside the Board we find the following criticism of the *Rutland Court Owners* case:

“*The Rutland Court Owners case would seem to be an act of legislation by the Board.* * * *

The Board was, however, faced with the fact that the National Labor Relations Act expresses two policies which are at times inconsistent: (1) the policy that employees should have freedom in selecting, by majority vote, representatives for

collective bargaining; (2) the policy that closed shop agreement, if properly made, should be enforced by discharge of employees for failure to affiliate with the contracting union. The Rutland Court Owners case shows that the Board prefers to be guided by the first and not the second policy where the agreement is about to expire. * * *

*The problem is one which, as Board Member Leiserson stated in the Rutland Court Owners case, requires Congressional action. * * ** (Italics ours.)

"Labor Disputes and Collective Bargaining",
Teller, Cum. Supp., April, 1947, pp. 105-106.

The dilemma created by the Rutland case.

The Board's disastrous policy not only subjected the employer, who in good faith complied with the closed shop contract, to penalties in the form of back pay for discharged employees, but also to legal sanctions in the courts for failure to perform a contract, the performance of which the Board had forbidden. This employer's dilemma has been stated by Teller as follows:

"This result, on the other hand, might be embarrassing to the parties to the agreement, since enforcement of the agreement might be secured in a law court, thereby subjecting the parties to inconsistent orders." (*Labor Disputes and Collective Bargaining*, Cum. Supp., April, 1947, p. 106.)

An order such as was entered in this case presented to a California employer a very real problem.

We know from what appears in *Park & T. I. Corp. v. Int. etc. of Teamsters, supra*, that the public policy

of the state of California permits the coercion of employees by other employees or labor organizations. In addition in California such "coercive" contracts are valid and enforceable. Section 1126 of the California Labor Code expressly provides for the enforcement of closed shop contracts.

"Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State."

Such contracts have been held valid and enforceable in the following California cases:

Levy v. Superior Court (1940), 15 Cal. (2d) 692, 104 Pac. (2d) 770;

Montalbo v. Hires Bottling Company (1943), 59 Cal. App. (2d) 642, 139 Pac. (2d) 666.

Since California permits the coercion of employees, it is very doubtful that its courts would hesitate to enforce a closed shop contract if the employer's sole defense should be an order of the Board based on the alleged malicious motivation of the contracting union. This for the reason that such coercion or malicious motivation, if directed at union members whose activities are considered by the contracting union inimical to its best interests, has the complete sanction of the California courts.

In *James v. Marinship Corporation* (1944), 25 Cal. (2d) 721, 155 Pac. (2d) 329, it was held that it is the

legal right of a union to expel from membership any person who has interests inimical to it or who may destroy it from within or who may refuse to abide by any reasonable regulation or lawful policy adopted by it. The Court said:

“Defendants argue that a union should not be compelled to admit all persons to membership, because some of such persons may have interests inimical to the union and may destroy it from within. *The right of the union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union (Brown v. Lehman (1940), 141 Pa. Super. 467 (15 A. 2d 513), supra; see Rest. Torts, comment b to Sec. 810) affords it an effective remedy against such persons.*” (Italics ours.)

James v. Marinship Corporation, supra, 25 Cal. (2d) at p. 736, 155 Pac. (2d) at p. 338.

There is no question but that the discharged employees in the instant case were seeking to destroy the CIO from within, and therefore, under California law, the CIO was fully justified in expelling them. Under such circumstances the CIO's conduct would be neither malicious nor unlawful, and Petitioner would have no defense to interpose to any action brought by the CIO to compel the enforcement of the contract.

There is another principle of law in addition to those discussed above, which would require the Petitioner to comply with the provisions of the “closed shop” contract, even though it knew of the alleged intended purpose of the CIO to use the contract to violate the Act. This principle is that it is no defense

to the performance of the contract that the obligor knows that the agreement or its performance might aid the obligee to violate the law. The principle has been stated as follows:

“The law is clear and decisive on the question of the enforceability of a contract even though one of the parties thereto has knowledge of an intended purpose of the other party, by means of the contract, or the performance thereof, to violate some law or public policy of the state. The rule in that regard is thus stated in 53 A.L.R. 1364 at page 1366:

“The rule, according to the great weight of authority, is to the effect that a contract legal in itself is not rendered unenforceable by the mere fact that one of the parties thereto has knowledge of an intended purpose of the other party thereto, by means of the contract or subject-matter thereof, to violate some law or public policy of some state; or, as is stated in 6 R.C.L. p. 696, “where there is no moral turpitude in the making or in the performing of the contract, the mere fact that an agreement the consideration and performance of which are lawful incidentally assists one in evading a law or public policy, is no bar to its enforcement, and that, if the contract has been performed by the promisee, it is no defense that the promisor knew that the agreement or its performance might aid the promisee to violate the law or to defy the public policy of the state, when the promisor neither combined nor conspired with the promisee to accomplish that result, nor shared in the benefits of such a violation.” ’ ’ ’

People v. Brophy, 49 Cal. App. (2d) 15, at 30-31, 120 P. (2d) 946, at 954-955.

The application of the express provisions of the Wagner Act itself placed employers in many perplexing and insoluble situations, but this had to be accepted because it was the express desire and intent of Congress. On the other hand it appears to us unjustifiable to inflict further penalties on an employer on the basis of inferences and assumptions which appear to be entirely contrary to the express and declared intent of Congress, particularly when the sanctions thus imposed are aimed at a state of mind and at activity heretofore considered entirely legitimate. We need not, however, rest our case on this argument.

In enacting the "Labor Management Relations Act, 1947", Congress has again declared that the Wagner Act was not intended to prohibit the coercion of employees by unions.

The Wagner Act generally, and Section 8 in particular, have been radically amended by the Labor Management Relations Act, 1947. The changes wrought in the pertinent sections of the Wagner Act by these amendments cannot be validly described as "clarifications". Such amendments give rise to a presumption of change, not clarification.

"* * * the amendment of the language in the particular noted signifies an intention to change the pre-existing law. In *United States v. Bashaw*, 50 Fed. 749, 754, it was said: 'The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act.'

‘Where changes have been introduced by amendment, it is not to be assumed that they were without design; usually an intent to change the law is inferred.’ (*In re Segregation of School District No. 58*, 34 Idaho, 222 (200 Pac. 138).) In *Rieger v. Harrington*, 102 Or. 603 (203 Pac. 576, 580), it was said: ‘By amending that statute, the legislature demonstrated an intent to change the pre-existing law, and the presumption must be that it was intended to change the meaning of the statute in all the particulars wherein there is a material change in the language of the amended act.’ ”

People v. Weitzel (1927), 201 Cal. 116 at pp. 118-119, 255 Pac. 792 at 793.

The Board’s position is that under the Wagner Act it had power to regulate labor unions by declaring them ineligible to be parties to a “closed shop” contract when the unions committed the unfair labor practice of coercing their members in the exercise of the rights guaranteed by Section 7 of said Act. The Board maintained that the Act so provided, and it follows that it would be unreasonable and unnecessary to “change” the Act for the purpose of inserting a provision which already existed therein. Section 8(b)(1) and (2) of the new Act provides in part as follows:

“(b) It shall be an *unfair labor practice* for a labor organization or its agents——

(1) *to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title; * * **

(2) *to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * **

29 U.S.C.A., Sec. 158(b)(1)(2).

Here we have for the first time in express language a statutory prohibition against the coercion of employees by other employees or labor organizations. Was it necessary to make a "change" to express what already was law? It seems to us that to answer this in the affirmative would be to charge Congress with indulging in fruitless byplay.

The Conference Report of the House accompanying the adoption of the Labor Management Relations Act, 1947, furnishes ample proof of the fact that change, not clarification, was the desired objective. We find that the Act was to be "two-sided", no longer "one-sided".

"In amending section 1 of the National Labor Relations Act (the policy thereof) the House bill omitted from the present law all of the so-called findings of fact, some of which have been so severely criticized as being inaccurate and *entirely one-sided*. The Senate amendment rewrote the findings and policies contained in section 1 of the National Labor Relations Act so that those findings will not hereafter constitute

an indictment of all employers. At the same time the Senate amendment inserted in the findings of fact a paragraph to the effect that experience has demonstrated that certain practices by some labor organizations have the effect of burdening commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of commerce. The Senate amendment further declared the elimination of such practices to be a necessary condition to the assurance of the rights herein guaranteed. Thus under the Senate amendment the findings and policies of the amended National Labor Relations Act are to be '*two-sided.*' The conference agreement adopts the provisions of the Senate amendment in this respect." (Italics ours.)

H. R. Report No. 510, 80th Congress 1st Session.

We also find that Congress knew that under the old Act an employee was not free from being coerced into a union, and that the new Act changes the situation so that now he is free to remain unorganized.

"The *second change* made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so."

H. R. Report No. 510, 80th Congress 1st Session, pp. 39-40.

The report shows that in defining in the new Act, the unfair labor practices of unions, Congress was "adding" to the Act. We submit that there is no necessity for adding anything to a statute if it is already there.

"Both the House bill and the Senate amendment amended section 8 of the National Labor Relations Act by *adding thereto unfair labor practices on the part of labor organizations.*" (Italics ours.)

H. R. Report No. 510, 80th Congress 1st Session, p. 40.

Finally, on this phase of the question, we submit that the Board's premise has no support in the past or present history of the Act, and that the Board's contention in this case and in the case of *Local 2880, etc. v. N.L.R.B., supra*, cannot be upheld by the rule announced by the Supreme Court in *Wallace Corporation v. N.L.R.B.* (1944), 323 U. S. 248, 89 L. Ed. 216. This uncertain pronouncement of an extremely divided Supreme Court should be applied only in cases disclosing a similar state of facts, to-wit, cases where the employer willingly or otherwise collaborates with a union in a discriminatory scheme. Compliance with a valid "closed shop" contract is not the type of collaboration denounced by the *Wallace* case.

We submit in the light of the foregoing that the order entered herein by the Board was in excess of the powers vested in it by the Wagner Act, and that it therefore constitutes a deprivation of the property of the Petitioner and the CIO without due process of law.

2. EVEN IF IT BE ASSUMED THAT THE ACT DID PROHIBIT THE COERCION OF EMPLOYEES BY UNIONS, THE PETITIONER WAS NEVERTHELESS ENTITLED TO A DISMISSAL OF THE COMPLAINT BECAUSE THE RECORD FAILS TO DISCLOSE ANY EVIDENCE SHOWING THAT THE CIO DISCRIMINATED AGAINST EMPLOYEES BECAUSE OF THEIR ADVOCACY OF ANOTHER ORGANIZATION AS THE BARGAINING REPRESENTATIVE.

In this portion of our argument it assumed that the Board has the power to prevent unfair labor practices by unions and to prohibit the performance of a "closed shop" contract in order to achieve this objective. It is also assumed that it is an unfair labor practice for a union to secure, under the terms of a "closed shop" contract, the discharge of an employee *because* he engaged in activities designed to secure a change in bargaining representatives. It is further assumed that it is an unfair labor practice for an employer to discharge an employee, at the request of a union pursuant to the terms of a "closed shop" contract, if he knows that the discharge was requested *because* of activity designed to secure a change in bargaining representatives.

The discharge of the employees was requested because of a violation of the CIO policy against strikes and not because of activity for a new bargaining agent.

It is our position that the record shows that the discharge of the employees was not requested *because* of activity designed to secure a change in bargaining representatives, but *because* of a clear violation of the CIO's policy against wartime strikes.

The record establishes that all of the discharged employees participated in one way or another in a strike¹⁴, and the Board admits this fact.

“For the next few days most of the respondent’s employees, *including all the complainants*, stayed away from work because of the ‘continuous meetings’, a stoppage which we find *constituted a strike.*” (Italics ours.) (Board’s Decision, R. 72.)

The record also establishes that the CIO had pledged itself not to engage in any strike for the duration of the war¹⁵, and that all the discharged employees knew that participation in this strike was contrary to this policy.

In addition, the record shows that on the day of the strike and before it began, the CIO distributed among the employees at Petitioner’s plant a pamphlet warning that those who participated in this strike would lose standing in the union as well as their jobs.¹⁶

The record likewise establishes that the CIO suspended or expelled all of the discharged employees because they fomented or participated in a wartime strike,¹⁷ and it is also a fact that some of them pleaded guilty to the charge of participating in or fomenting such a strike.¹⁸

¹⁴R. 70; 71-72; 201-203; 258; 274; 296; 365-367; 404-405; 420-421; 506-507.

¹⁵R. 420-421.

¹⁶R. 257; 789-790.

¹⁷R. 741-742; 742-743; 856; 867.

¹⁸R. 506-507.

The Board's decision makes no finding contrary or in conflict with any of the facts above recited, but the Board does conclude that the employees were expelled because of activity designed to displace the CIO as bargaining representative. In so doing the Board confuses the motive with the (be) cause.

An act unlawful in itself is not converted by a malicious or bad motive into an unlawful act.

That the CIO had the right to discipline its members for participating in a strike called in violation of union policy, is, as the Trial Examiner states,¹⁹ hardly open to question, and the Board does not in its decision deny that the CIO had the right to discipline its members for such a reason.

In view of the admitted facts, it must be conceded that the Board by its decision and order has erroneously, on the basis of the CIO's malicious motivation, denied the CIO the legal right to discipline its members and control its affairs.

We submit that there is absolutely no legal basis for this action of the Board. A state of mind is not a wrong for which the law gives redress, and it is the general rule that a rightful act is not rendered actionable as a wrong by virtue of the bad intent with which it is done.

“A malicious motive or a mere intention to do wrong, not connected with the infringement of a legal right, cannot be made the subject of a civil action, for malice, of itself, as a state of mind,

¹⁹R. 63.

is not a wrong for which the law gives redress. It is only when words or acts are inspired or prompted by malice that comes within judicial cognizance. The intention to do a wrong must be coupled with the doing or accomplishment of the act intended. Accordingly, it may be laid down as a general rule that a rightful or legal act, or the exercise of a legal right, is not rendered actionable as a wrong to another by virtue of a bad intent with which it was done or the existence of a malicious motive that prompted it. In other words, whatever a man has a legal right to do he may do with impunity and without raising a cause of action against himself because of bad motives, if he exercises his legal right in a legal way, even though damage results to another."

1 *Am. Jur., Actions*, Sec. 25, pp. 420-421.

The Board itself has recognized the legal principle above set forth. In *National Linen Service Corp.* (1943), 48 N.L.R.B. 171, the Board recognized the difference between motive and cause in a case where it was conceded that the employer had intended to dismiss certain employees because of union activity. In so recognizing this principle and applying it, the Board approved the following findings of one of its Trial Examiners in the above cited case:

"On that day Thorne was paid off and has not again been employed by United at any of its branches or by any of the other branches of National. *From the foregoing it is found that although Thorne's name was on the list of employees to be dispensed with because of their*

union activities, when and as a suitable pretext could be found, the circumstances surrounding Thorne's discharge did not constitute a pretext but a normal and legitimate reason for refusing to continue him in the employ of United. In discharging Thorne, United did not engage in any unfair labor practice.

* * * * *

“Lyons testified that his anti-Semitism first came to the surface in about September 1940 and that it continued to increase from then until the United States entered the war. There is no evidence as to when this first came to Gordon's attention. With few exceptions, the management of National appears to be essentially Jewish. Bearing in mind that notorious anti-Semitism openly expressed among his fellow employees by one in the position occupied by Lyons may well be highly obnoxious to a Jewish employer, *it is found that, although Lyons was on the list of employees to be dispensed with at the first pretext because of their union activities, nevertheless, his conduct, independent of his union activities, was obnoxious to the management of United and was of a character which justified his discharge regardless of his union affiliation, and that his union affiliations were not the motivating cause of his discharge. In discharging Lyons, United did not engage in any unfair labor practices.*” (Italics ours.)

National Linen Service Corp., supra, at pp. 204-205.

A labor union, it is submitted, should have the right, as other persons or associations, to preserve and pro-

tect itself from those who would destroy it from within. The Board's failure to apply legal principles without discrimination herein has resulted not only in unwarranted interference with the internal affairs of the CIO, but also in reviving a discredited defense to the enforcement of legal rights. The principle of this discredited defense as applied in this case, permits delinquent members of a union to immunize themselves from any discipline or punishment by merely manifesting their hostility to the bargaining agent before or after the commission of the offense. Applied generally, this discredited defense would permit defaulters to defeat all claims against them by merely contending that the obligee was actuated by malicious motives.

“The proposition is clearly and forcibly stated in *Jenkins v. Fowler*, 24 Pa. St. 308, as follows: ‘Malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful. When a creditor who has a just debt brings a suit or issues execution, though he does it out of pure enmity to the debtor, he is safe. In slander, if the defendant proves the words spoken to be true, his intention to injure the plaintiff by proclaiming his infamy will not defeat justification. One who prosecutes another for a crime need not show he was actuated by correct feelings, if he can prove that there was good reason to believe the charge was well founded. In short, any transaction which would be lawful if the parties were friends cannot be made the foundation of an action merely because they happen to be enemies. As long as a man

keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches hearts.' "

Chambers v. Baldwin, 91 Ky. 121, 128, 15 S. W. 57, 59, 11 L.R.A. 545, 549, 34 Am. St. Rep. 165, 169.

It is, therefore, submitted that although it might be argued that there was evidence of "bad motive," there is certainly no evidence that the discharges were requested and obtained because of activity designed to effect a change in bargaining representatives, and for this reason Petitioner herein was entitled to the dismissal of the complaint.

3. **EVEN IF IT BE ASSUMED THAT THE BOARD HAS POWER TO PREVENT THE COERCION OF EMPLOYEES BY LABOR ORGANIZATIONS AND THAT THE CIO SUSPENDED ITS MEMBERS BECAUSE OF THEIR ADVOCACY OF ANOTHER UNION, THE PETITIONER WAS ENTITLED TO A DISMISSAL OF THE COMPLAINT BECAUSE THERE IS NO EVIDENCE IN THE RECORD THAT THE PETITIONER HAD KNOWLEDGE OF THE CIO'S ALLEGED MALICIOUS MOTIVATION.**

The findings of the Board should be carefully scrutinized because they are in conflict with those of its Trial Examiner.

The Petitioner, under the policy enunciated by the Board in the *Rutland Court Owners* case, *supra*, is here charged with violating Section 8(1)(3) of the Wagner Act on a general finding by the Board that it had "knowledge" that the CIO suspended the employees because of activity designed to effect a change

in representatives. (R. 79.) On the other hand the Trial Examiner who presided at the hearing, found that Petitioner did not have such knowledge and recommended the dismissal of the complaint in its entirety. (R. 65; 67.) Under such circumstances we feel justified in calling the Court's attention to the rule that "while the report of the examiner is not binding on the Board, yet where it reaches a conclusion opposed to that of the examiner, * * * the report of the latter has a bearing on the question of substantial support and materially detracts therefrom."

A. E. Staley Mfg. Co. v. N.L.R.B. (1941; CCA 7th), 117 Fed. (2d) 868, at 878;

N.L.R.B. v. Superior Tanning Co. (1941; CCA 7th), 117 Fed. (2d) 881, at 890;

Wilson & Co. v. N.L.R.B. (1941; CCA 8th), 123 Fed. (2d) 411, at 418;

Wyman-Gordon Co. v. N.L.R.B. (1946; CCA 7th), 153 Fed. (2d) 480, at 482.

In presenting the question of the sufficiency of the evidence to sustain the findings of the Board, we do so knowing that it has the exclusive province of appraising the evidence and of drawing inferences from established facts, but we also know that in so doing it must observe certain fundamental standards. It is required to observe the traditional rule against the presumption of liability or bad faith; it must base its findings on substantial evidence—not mere scintilla, and the inferences it draws must be reason-

able inferences generated by facts—not surmise or speculation.

Boeing Airplane Co. v. N.L.R.B. (1944; CCA 10th) 140 Fed. (2d) 423, at 433.

We believe that what follows will show that the Board erred in finding contrary to the Trial Examiner, and that in its own findings it has not observed the fundamental standards above summarized.

The Board's findings that Petitioner had "knowledge" of its employees' anti-CIO activity when it discharged the first two groups of employees, are based on invalid and prohibited inferences and should be disregarded.

On July 30, 1945, the Petitioner discharged five employees who had been CIO stewards, and on July 31, 1945, it discharged four employees who acted as committeemen for the other employees opposing the CIO. The Board found that the Petitioner had "knowledge" of its employees' "anti-CIO" activity when it discharged these persons. These findings are based on invalid and prohibited inferences.

The term "anti-CIO", so often to be encountered herein, is indiscriminately used by the Board in its decision when qualifying or describing employee activity or purpose. This is an ambiguous term and it is seldom possible to determine from the context whether the Board has used it to describe, in relation to the CIO's right to discipline its members, permissible and innocent conduct, allegedly protected by Section 7 of the Act, or prohibited and punishable conduct not within the protection of the Act. There-

fore, to make clear the defects in the Board's findings, it is necessary to define or describe permissible and prohibited "anti-CIO" activity or purpose. Under the Board's announced policy in the *Rutland* case, *supra*, activity designed to secure a change in bargaining representatives is permissible "anti-CIO" activity, and is protected by the Act. Resignation or withdrawal from the CIO, *the Board admits*, would ordinarily entitle the Petitioner to discharge an employee in view of the "closed shop" contract, and is, therefore, prohibited anti-CIO activity not protected by the Act. (Board's Decision, R. 78, Footnote 8.) A strike violative of the CIO's rules and not authorized by it, is prohibited anti-CIO activity and is not protected by the Act. (*N.L.R.B. v. Draper Corporation* (1944; CCA 4th), 145 Fed. (2d) 199, at pp. 202-203.) Failure to perform the duties of office and the sabotage of policy adopted by majority vote is, on general principles, prohibited anti-CIO activity not protected by the Act.

With the foregoing definitions in mind, we will first discuss the finding involving the discharges made on July 30, 1945.

The record shows that a meeting was called for July 30, 1945, and that the notices announcing it were posted in Petitioner's plant on July 28, 1945. (R. 192; 213.)

The meeting was called for a dual purpose. One was to foment activity designed to secure the selection of a new bargaining representative, and was therefore

permissible anti-CIO activity. The other was to induce the employees to withdraw from the CIO and was therefore prohibited anti-CIO activity. (R. 189-190; 260-261; 286-287; 408-409.)

In the early afternoon of the day of the meeting the five stewards were suspended and dismissed. (R. 667; 523-525; 538-539.) Nothing was said or done at that time which could have informed the Petitioner as to the reason for the suspension by the CIO of these five men. The Board, however, in order to bring home to Petitioner guilty knowledge of the CIO's motivation, and of the stewards' permissible anti-CIO activity, draws certain invalid inferences from the fact that a "lay-off" of two hours for the meeting was requested and granted. (R. 268-269.) The record shows that the persons who requested the lay-off said nothing which would have informed the Petitioner as to either of the purposes of the meeting. Accordingly the Board was forced to draw its inferences as follows:

"The respondent must have learned of the (permissible anti-CIO) purpose of the meeting, or it would not have agreed to shut down the plant for about two hours so that the employees could attend." (R. 69-70.) (Italics and parenthetic insertion ours.)

On the basis of this finding, the Board concludes that, "before the discharge of the stewards the respondent must have learned of their (permissible) *anti-CIO activity*, for it is unreasonable to suppose that it would have agreed to the request

made by one of them to shut down operations to enable working employees to attend a meeting the stewards planned to hold *without ascertaining the reason of the meeting.*" (Italics and parenthetical insertion ours.) (R. 77.)

The Court will note how the Board has clandestinely introduced in both its premise and its conclusion the silent assumption that Petitioner must have learned the "true" or permissible purpose of the meeting and must have ascertained the "true" or permissible reason for the meeting. We submit that this is a perfect example of fallacious reasoning.

The Board first postulates on its *ipse dixit* that employers never grant time for meetings unless they ascertain the purpose of the meeting. Satisfied with this premise the Board infers therefrom that Petitioner must have ascertained or been given a reason for the meeting. Having gone this far the Board then resorts to the much condemned practice of drawing one inference upon another, and deduces from the first the further inference that Petitioner must have learned the "true" or permissible anti-CIO purpose of the meeting when it ascertained or was given a reason therefor. It is the rule that findings reached in this fashion are not supported by substantial evidence.

N.L.R.B. v. Pick Mfg. Co. (1944; C.C.A. 7th; 135 Fed. (2d) 329, at 333.)

The foregoing demonstrates that the Board has failed to prove that employers in general, and Peti-

tioner in particular, invariably ascertain the "true" purpose of meetings for which they grant time. But there is an even stronger reason against the propriety of basing this finding on an inference. Two of the discharged employees, one the steward who requested the lay-off and another who accompanied him on this mission, were both Board witnesses at the hearing. Other witnesses at the hearing who also had knowledge of this matter were Mr. Altman, Petitioner's plant superintendent, the person who granted the request for time off, and Mr. Carter and Mr. Stansbury, his assistants, who were present in his office at the time. (R. 268-269.) There were, therefore, at least five persons from whom the Board's counsel could have elicited direct testimony, had he so desired, as to whether Petitioner was told or ascertained the permissible anti-CIO purpose of the meeting. Under such circumstances the Board cannot rely on inferences or on its "expertness" to sustain this finding. When direct evidence as to a fact is available, the party having the burden of proof may not rely on inferences.

*"Inference is capable of bridging many gaps. But not, in these circumstances, one so wide and deep as this. * * **

"No favorable inference can be drawn from the omission. It was not one of oversight or inability to secure proof. That is shown by the thoroughness with which the record was prepared for all other periods, before and after this one, and by the fact petitioner's wife, though she married him during the period and was available, did not tes-

tify. 'The only reasonable conclusion is that petitioner, or those who acted for him, deliberately chose, for reasons no doubt considered sufficient (and which we do not criticize, since such matters, including tactical ones, are for the judgment of counsel) to present *no evidence or perhaps to withhold evidence* readily available concerning this long interval, *and to trust to the genius of expert medical inference and judicial laxity to bridge this canyon.*

"In the circumstances exhibited, the former is not equal to the feat, and the latter will not permit it. No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap and take the place of evidence which, according to all reason, must have been at hand. To allow this would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to secure, but for evidence disclosed to be available and not produced. This would substitute speculation for proof."

Galloway v. U.S. (1943), 319 U.S. 372, at 386-387, 87 L. Ed. 1458, at 1468-1469.

In addition to the logical obstacles and the rules of evidence which render the Board's finding invalid, there are other matters which militate against it.

First, it is the uncontradicted fact that the meeting had a dual purpose, one which was proper and the other prohibited. Assuming, therefore, that Petitioner did ascertain the dual purpose or reason for

the meeting, the question is what power did it have to compel a disclosure with respect to the state of mind and the internal affairs of the CIO which would enable it to ascertain whether the discharges were requested because of permissible or because of prohibited activity? It must be conceded that Petitioner did not have the power to compel disclosure of this information. In addition, the Petitioner did not possess the "expertness" of the Board and was not privileged, as was the Board, to draw "either of two inconsistent inferences from the evidence" and to base a finding on the one so selected.²⁰ Under such circumstances we submit that Petitioner was entitled to presume that in this transaction the CIO was acting in fairness and in honesty and that it was suspending the men because of prohibited activity. If Petitioner were to have been compelled to take on the attribute of a judge, a function which the Board has in fact cast upon it (R. 79), it would have been forced to find that the evidence before it did not establish the illegal motivation of the CIO because it gave support both to the contention that the CIO acted in good faith and to the contention that it did not.²¹

Second, the representatives of the Petitioner when requested to give time for the holding of the meeting, could not have made inquiry with respect to any union activities which were to be discussed thereat except at

²⁰*N.L.R.B. v. Nevada Consol. Copper Corp.* (1942), 316 U.S. 105, at 106-107, 86 L. Ed. 1302, at 1307.

²¹*Pennsylvania R. Co. v. Chamberlain* (1932), 288 U.S. 333, at 339-340; 77 L. Ed. 819, at 823; *Gunning v. Cooley*, 281 U.S. 90, at 94-95; 74 L. Ed. 720, at 724-725.

the risk of being charged with unfair labor practices violative of the Wagner Act. The Board has consistently held that the questioning of workers by executives or supervisory employees concerning union activities constitutes interference or coercion violative of Section 8(1).

Biles Coleman Lbr. Co. (1937), 4 N.L.R.B. 679;
Cover Fork Coal Co. (1937), 4 N.L.R.B. 202;
Crow Coal Co. (1938), 9 N.L.R.B. 1149.

Since it must be presumed that Petitioner's representatives acted in good faith and did not violate the Act, the conclusion must be that they did not question the employees as to the nature of the union matters to be taken up or discussed at the meeting. (*Commentaries on the Law of Evidence, Jones, 1913, Vol. 1, Sec. 13, pp. 98-100.*) This being so, Petitioner's representatives could have gone as far as asking the steward and his companion the purpose of the meeting, and if the answer had been that it was for union activity, this would have limited the extent of their questioning, as under the rule above recited any further inquiry would have resulted in an unfair labor practice.

Third, the finding of the Board, even though the other objections against it were not sufficient, is entirely inconsistent with the facts. It must be remembered that the Petitioner herein stands charged with and has been found guilty of discharging the employees because of their activity against the CIO and in favor of the AFL. If as charged and found it was the intent of Petitioner to assist the CIO and to dis-

courage membership in the AFL, it is hardly reasonable to suppose that, knowing that the meeting was for the purpose of fomenting opposition to the CIO, Petitioner would have consented thereto. We submit that it is illogical to maintain that the Petitioner was both for and against the CIO.

In view of the foregoing, it is submitted that the Board's finding that the Petitioner knew of the permissible or other anti-CIO purpose of the meeting and the anti-CIO activity of the stewards when their discharge was requested, cannot stand. This being so, it follows that the further finding that the Petitioner had guilty knowledge of the CIO's alleged illegal motivation when it acceded to the discharge of these five persons, also cannot stand. Therefore, it must be concluded that in this instance the Board erred when it found that the Petitioner illegally assisted the CIO.

The finding on the discharge of the four committeemen suffers from the same infirmities as does the one made with respect to the stewards.

After the discharge of the stewards 'the meeting was held as scheduled, and those attending the meeting appointed four of their number to act as a committee to secure a reinstatement of the stewards and adopted a resolution to go on strike in event the stewards were not reinstated. (R. 196; 848-850.) At this meeting authority was given to send telegrams to the CIO and to the Petitioner giving notice of withdrawal or resignation of those present from the CIO. (R. 469-470; 786.) The foregoing establishes two acts constituting prohibited conduct not protected by the Act.

On the morning of July 31, 1945, the committee of four, armed with the authority conferred upon them by other employees, called at the plant and demanded that the five stewards be put back to work immediately, stating that otherwise "they wouldn't be responsible for the consequences." (R. 525-526.) This request for reinstatement was denied. The Board's version as to what occurred thereafter and its findings thereon are as follows:

"On the morning of July 31, 1945, the negotiating committee went to the respondent's office and interviewed Superintendent Altman and Vice President Railey in an attempt to get the discharged stewards reinstated, at the same time advising the respondent of the anti-CIO telegram (prohibited conduct), which arrived during the interview. *After the anti-CIO purpose of the interview had become plain*, Heide, a CIO vice president, who was present, stated before Altman and Railey, admittedly management representatives, that the suspension notices of three of the four members of the negotiating committee were in the mail, asked the name of the fourth member, and upon learning that it was Olsen stated that he too would receive a suspension notice. Thus the respondent was in effect *again informed that the CIO's motive was to remove the opposition*. (R. 71.) (Italics and parenthetic insertion ours.)

* * * * *

Before the discharge of the committeemen at the termination of the strike on August 3, 1945, however, the respondent learned of the CIO's plan to use its closed-shop contract to remove its opponents, for when CIO Vice President Heide dis-

covered the anti-CIO activity of the committeemen, he baldly told two management representatives, Vice President Railey and Superintendent Altman, that the committeemen were thereupon being suspended." (R. 77.)

The Court will note in connection with the foregoing finding that the Board has again with the use of its ambiguous term "anti-CIO" activity, introduced therein the tacit assumption that the interview disclosed that the stewards and the committeemen were engaged *solely and exclusively* in activity designed to effect a change of representatives, and that is not the fact.

The "anti-CIO" telegram was evidence of withdrawal from the CIO, and according to the Board's own doctrine prohibited conduct not protected by the Act. The employees' charge that the CIO had failed to obtain increases in wages is indicative of dissatisfaction with the CIO, but it is not by any stretch of the imagination a statement of activity on behalf of another organization. The CIO's statement respecting the wartime freeze in wages and their right to discipline their members and to "keep them working" may be a defense or an explanation of its position, but it is certainly not indicative of a purpose to use the "closed shop" contract to discourage activity on behalf of another labor organization. (R. 527-528; 545.)

The right of the CIO to discipline its members and "to try to keep them working" must be evaluated in the light of its pledge not to engage in strikes, and of

the undisputed fact that the employees involved were committed to a strike in the event the stewards were not reinstated. It is submitted, therefore, that the Board's assumption is not only invalid, but is also, in effect, a misstatement of the record, and that the conclusion must be that Petitioner did not at this time or before receive any information regarding the CIO's alleged illegal motivation.

Also illustrative of the Board's attempt to bolster its decision by the use of false assumptions is its laconic mis-description of the pamphlet distributed the same day by the CIO. Although it was a warning against participating in an unauthorized strike (R. 789-790), the Board by omission of facts has translated it into a warning to those who would assist the "CIO traitors." (R. 71.) Findings reached in this manner will not be accepted.

"* * * the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence."

N.L.R.B. v. Union Pacific Stages, Inc. (1938)
(C.C.A. 9th), 99 Fed. (2d) 153, at 177.

The finding that on August 15, 1945, Petitioner obtained knowledge that the CIO was threatening employees "with discharge" for AFL activity is not supported by the record.

The following finding appears in the Board's decision:

"On August 15, 1945, according to the uncontradicted and credited testimony of employee Zulaica, he reported to Production Manager Stanberry, admittedly a management representa-

tive, that C.I.O. representatives were threatening him in the plant with discharge for wearing an A. F. of L. button. Stanberry admitted at the hearing that it was reported to him that C.I.O. adherents were 'threatening the men' with discharge under the closed-shop contract for wearing A. F. of L. buttons." (R. 73.)

We maintain that the foregoing findings of the Board have no substantial support in the record and depend entirely for their validity on prohibited inferences.

We have set forth all the testimony bearing thereon, in order not to encumber this portion of the brief, in the appendix at pages i-v.

In the light of the record we submit that nothing having the dignity of an inference could be drawn therefrom to show that on August 15, 1945, the management of Petitioner received knowledge of a CIO threat to discharge the men under the terms of the "closed shop" contract for AFL activity. If on the other hand it should be argued that an inference could be drawn to this effect, we point out that both Mr. Zulaica and Mr. Stanberry were witnesses at the hearing and that by proper questioning either one or the other, if it was the fact, could have testified directly that such a threat had been made *and that it was in fact communicated to a representative of petitioner's management*. When direct evidence as to a fact is available, the party having the burden of proof may not rely on inference to establish it.

Galloway v. U. S., 319 U. S. 373, 87 L. Ed. 1458,
supra.

The Board's finding that on August 17, 1945, Petitioner was clearly apprised of the nature of the CIO's motivation by the charges of discrimination filed with the Board, is contrary to the record.

The following finding appears in the Board's decision:

"On August 13, 1945, the A. F. of L. verified and thereafter duly filed the original unfair labor practice charge herein, alleging the discriminatory discharge of the five stewards and the four committeemen.

* * * * *

Moreover, the respondent, when it refused the reinstatement application of these two groups of discharged employees on August 17, 1945, was clearly apprised of the nature of the dismissals by the formal charges of discrimination which the A. F. of L. had filed with the Board." (R. 72-73, 77-78.)

This finding is entirely contrary to the record. The pertinent portion of the charge filed by the AFL read as follows:

"Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that Colgate-Palmolive-Peet * * * is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (3) of said Act, in that on or about the dates hereinafter specified, it, * * * terminated the employment of:

Edwin H. Thompson July 30, 1945

Lincoln F. Olsen " " "

William Sherman " " "

David Luchsinger " " "

Harold L. Lonnberg " " "

Frank Marshall July 31, 1945
 Harry Smith " " "
 Clyde Haynes " " "
 Sanford Moreau " " "

*because of their refusal to adhere to policies of Warehouse Union Local 1-6 ILWU, a labor organization, * * *.*

International Chemical Workers
 Union, A.F.L.,

By /s/ Harvey E. Howard,
 1440 Broadway, Oakland, Calif. HI-5922.

Subscribed and sworn to before me this 13th
 day of August, 1945, at San Francisco, California.

/s/ Merle D. Vincent, Jr.,
 Field Examiner.

Date filed August 14, 1945." (Italics ours.) (R. 92-93.)

We submit that the foregoing not only establishes the falsity of the Board's finding, but also constitutes an admission on the part of these men and the AFL that they were not discharged for activity on behalf of the AFL but "because of their refusal to adhere to policies of" the CIO. We know that the petitioner knew by this time that all of these men had violated at least one of these policies and that some of them were accused of failing to fulfill their duties of office and of failing to enforce the CIO's policy against racial discrimination. Under such circumstances, how can it be said that petitioner knew that the discharges had been requested to discourage the exercise of rights guaranteed by Section 7 of the Act?

The Board's finding that on August 31, 1945, the Petitioner was again informed of a CIO threat to discharge employees is not supported by the record.

The Board in its decision made the following finding:

"On August 31, 1945, a C.I.O. representative told employee Norris that she was discharged for transferring from the C.I.O. to the A. F. of L. She reported the conversation to Production Manager Stanberry, who merely replied, 'He can't do that.' " (R. 74.)

The foregoing finding depends for its validity on the assumption that the employee, Norris, in reporting the conversation to Stanberry, also reported that she had been discharged "for transferring from the C.I.O. to the A. F. of L.". Mrs. Norris' testimony clearly shows that she made no such report to Stanberry. Here is what she said:

"Q. (By Mr. Royster): Now, what was your conversation with Mr. Gleichman on this occasion, Mrs. Norris?

A. I saw Mr. Gleichman coming. My machine was broken down, so I walked over to talk to one of the grls because he made it so tough for me the day before that I didn't want to get into an argument with him. Well, he followed me. He asked me if I had changed my mind, that he gave me time to go home and think it over, that I would drop A. F. of L. and stick by CIO. I told him 'No,' that I hadn't changed my mind. He said, 'I held a letter out for you until today.' He says, 'You are fired. You might as well get off the floor right now,' and I got off.

I walked over to Don Stanberry, the Superintendent, and I said I didn't see why I should be treated that way, that I didn't do anything.

Q. Well now, just a minute.

Just what did you tell Don Stanberry?

A. I said, 'That union fellow kicked me off the floor. He told me I was fired,' and he shook his head and he said, 'He can't do that.'

So I said, 'Well, I am going down to see Mr. Altman and find out if he can kick me off the floor.'

I went downstairs, to the office, and Mr. Altman was not there, but Mrs. Olys was there.

Q. That is O-l-y-s.

A. I don't know how she spells her name.

Trial Examiner Ruckel: Who is she?

A. She was at the time the timekeeper.

Q. (By Mr. Royster): And after a conversation with Mrs. Olys what did you do?

A. She walked out on the platform with me, and she said, 'Don't cry, Kay. You go right back up to your job,' and I did.'" (R. 484-485.)

In connection with the foregoing it must be observed that Mrs. Norris had participated in the strike and that petitioner's representatives were entitled to infer that the threat to obtain her discharge would follow from this activity.

The Board's finding that the Petitioner discharged twenty-eight employees for permissible AFL activity is not sustained by the record.

The Board found as follows:

"Between August 31 and September 13, 1945, the respondent invoked the closed-shop contract

at the C.I.O.'s request and discharged the remaining 28 complainants, including Zulaica and Norris, referred to above. In its brief before the Trial Examiner the respondent admitted knowledge by this time of the A. F. of L. activity of many of its employees, including by inference the aforesaid group of 28 complainants." (R. 74-75.)

This finding, like so many others, depends for its validity on the tacit assumption that the twenty-eight employees involved had engaged *solely and exclusively* in permissible AFL activity designed to effect a change in bargaining representatives. We know, and the petitioner knew, that they all had participated in the strike, and, as it later developed, about half of them pleaded guilty to having taken part in this prohibited activity. The record also discloses that it was stipulated at the hearing, as we have shown elsewhere, that the majority of them had authorized the sending of the telegrams giving notice of withdrawal from the CIO. In connection with this finding, the Board makes much of the fact that the petitioner's Labor Relations Director, Wood, refused to accede to an "unofficial" request for the discharge of a large number of employees. (R. 73-74.) It is the Board's position that this "unofficial" request for discharge "must have furnished the respondent further evidence that the CIO was using its closed-shop contract as a means for removing its opponents among the employees". It could also be validly inferred from the facts that the CIO desired to discipline its members for this and other prohibited activities. It must be remembered

that the CIO, prior to this incident, had conducted a mass checking of dues books (R. 709-712), and that the CIO representative who made the unofficial request for discharges stated to Mr. Wood that some of the persons involved were in bad standing, had not paid their dues or were not members of the CIO. (R. 729.) Frankly, we can see nothing sinister in Mr. Wood's efforts to prevent the discharge of a large number of petitioner's employees. There is nothing in this from which it could be reasonably inferred that Mr. Wood felt that he was at liberty to comply or not to comply with the contract as he saw fit. As a matter of fact, when Mr. Wood was officially advised by the CIO to release these persons, he complied. We submit that nothing can be made of Mr. Wood's efforts to mitigate the legal consequences which resulted from the performance of the closed-shop contract.

The Board's conclusionary finding that Petitioner made no bona fide effort to evaluate the evidence is based on an invalid presumption, disregards a valid presumption and is contrary to the record.

If the distinction between "permissible" and "prohibited" anti-CIO activities is observed in appraising the findings of the Board, we find that the petitioner had before it, except for the occasion when the five stewards were discharged, a set of facts which indicate permissible activities for and on behalf of the Welfare Association and the AFL as well as prohibited conduct not protected by the Act directed against the CIO. Such a situation would ordinarily bring into play the principle that malicious motives

do not render rightful conduct actionable as a wrong. Here the employees' prohibited conduct, independent of their permissible union activities, was of a character which justified their discharge, even under the Board's own understanding of the law. (*National Linen Service Corp.* (1943) 48 N.L.R.B. 171, *supra*, at pp. 204-205.) Accordingly, the Board, for the purpose of giving support to its order has made the conclusionary finding that "petitioner made no 'bona fide' effort to evaluate all the evidence before it when it allegedly decided, despite the CIO's failure to deny the obvious facts, to believe that the CIO was not acting in reprisal against the complainants because of their anti-CIO activity." (R. 79.)

This finding, like all others, depends for its validity on the assumption that the "anti-CIO" activity of the employees was wholly permissible and on the following factors:

(a) *The presumption that Petitioner knew that under the Act it was its duty to evaluate the evidence.* Unless this presumption is postulated, the Petitioner cannot be charged with failing to "make a bona fide effort to evaluate the evidence". There is implicit in this a charge of "bad faith" based on the presumption that Petitioner knew the law, or the Board's view of the law.

(b) *Rejection of the uncontradicted testimony of Petitioner's representatives with respect to their inability to determine the true motives or reasons of the CIO.* This rejection of uncontradicted testimony re-

quires that the presumption that Petitioner's officers acted in good faith be disregarded. This presumption cannot be disregarded because the testimony of Petitioner's officers was not impeached, is not inherently improbable, and bad faith cannot be attributed to them on the basis of the invalid presumption that they had knowledge of the Board's view of the law.

- (a) The finding that the Petitioner made no effort to evaluate the evidence before it is invalid because it is based on the equally invalid presumption that the Petitioner knew of the Board's view of the law.

It will be noted that in its decision in this matter, the Board announced for the first time that in cases of this type the Petitioner must make a bona fide effort to evaluate the evidence before it, relative to the Union motive in demanding an employee's discharge. ("Guide to National Labor Relations Act", Tucker, page 226 (1947) Commerce Clearing House, Inc.) Prior to that time, and only after overruling its decision in the *Ansley* case, *supra* (18 N.L.R.B. 1029), the Board had held that under the Act, if the employer had knowledge that the discharge was requested because of permissible Union activity, the Act was violated. But it had not placed on the employer an affirmative duty of evaluating or weighing the evidence. As a matter of fact, the Board had refused, up to the time of its decision herein, to pass upon the contention that the employer "had a duty to inquire concerning the reason" for the discharge of an employee. (*Diamond T Motor Company* (1945), 64 N.L.R.B. 1225-1226.) There is no presumption that

Petitioner had knowledge of these decisions of the Board²³, and even if it could be shown that it had actual knowledge thereof, there was nothing in them which would have informed the Petitioner of the affirmative duty which the Board has imposed upon it. The Board's Trial Examiner, who presided at the hearing of this case, and who is to be presumed to have had some knowledge of the law and the decisions of the Board, did not think that any such duty rested on the Petitioner. In his intermediate report, he stated:

“Assuming, for the moment, that the respondent believed that both factors prompted the C.I.O.'s request, the undersigned knows of no feasible method by which the respondent could determine which factor was the motivating one in the C.I.O.'s decision to invoke the closed-shop provision of the contract.” (R. 59.)

In a footnote appended to the foregoing quotation, he said:

“Or is the presence of an illegitimate motive alongside a legitimate one, sufficient, as the Board has frequently ruled where discharges absent a closed shop are concerned, to render a discharge violative of the Act? The undersigned does not believe that it is.” (R. 59.)

And he concluded on the basis of a case theretofore decided by the Board, as follows:

²³“Litigants are not bound to take notice of executive decisions on legal questions.” *Todd v. S.E.C.* (1943; CCA 6th), 137 F. (2d) 475, at p. 479.

“Here, again, as in the case of the stewards and the committeemen, *the respondent was under no duty to investigate to ascertain the real motive of the C.I.O. where there was evidence that conflicting motives existed.* As the Board said in the Diamond T case:

While the respondent knew of the activities of these employees on behalf of the Union during the pendency of a question concerning representation, it does not follow that the Independent was motivated by such activities and not by lawful considerations in demanding their discharge.

In the Diamond T case, the respondent did not have knowledge of any activity by the employees in question which might have prompted a demand for their discharge, other than their activity on behalf of the rival union. In the instant case, the respondent had knowledge of at least two other facts, one, participation by the employees in an unauthorized strike, and the other, the announcement of their withdrawal of union membership—*either of which furnished a lawful basis for suspension by the Union.*” (Italics ours.) (R. 62.)

It is submitted, therefore, that for Petitioner to have known that it was required to weigh and evaluate evidence it would have to be presumed that its officers were endowed with an acuteness and a knowledge of the law not ordinarily possessed by judges and lawyers and seldom, if ever, attributed to laymen. In proof of this, we need only offer the irreconcilable conflict existing between this Circuit and the

7th Circuit on the basic question of law herein involved.

Since it is patent that the Petitioner could not have had actual knowledge of the law as viewed by the Board, it is apparent that the charge of bad faith or lack of good faith in evaluating or weighing the evidence must rest on the presumption that petitioner knew the law. However, the Board may not rely on the presumption that all persons are deemed to know the law in order to establish bad faith or lack of good faith on the part of Petitioner. The general rule which prohibits the Board from relying on this presumption has been stated as follows:

“A knowledge of law will not be presumed in order to charge a party with bad faith, nor is there, on the question whether or not one has acted corruptly, a conclusive presumption that he knows the law.” (31 C.J.S. Evidence, Sec. 173, p. 760.)

There is also no presumption that anyone knows how the Courts, much less administrative tribunals, will construe law. The rule in this respect has been stated as follows:

“Persons are not presumed to know how the Courts will construe the law * * *.” (31 C.J.S. Evidence, Sec. 132, p. 760.)

It is definitely established, therefore, that the Board cannot rely on any such presumption to attribute bad faith to Petitioner. It is also well to note that the difference in view which existed between Petitioner's counsel and the Board is evidenced by the record and

furnishes ample proof of the fact that Petitioner acted in good faith after being advised by its said counsel of what its duties were under the Act. The record discloses the following with respect to this matter:

“Q. Not at that time. Did you and Mr. Railey do anything about getting legal counsel in connection with the interpretation of your collective bargaining agreement with the ILWU?

A. Yes, sir.

Mr. Rowell. Well, Mr. Examiner, that is a similar inquiry that I tried one time.

Mr. Hecht. That state of mind of these persons, Mr. Examiner.

Mr. Edises. A question of good faith enters in here, Mr. Examiner.

Trial Examiner Ruckel. He may answer.

A. Yes, we did.

Q. (By Mr. Hecht). And what is it you did?

A. Well, when I returned Mr. Railey showed me a letter from Clark & Heafey.

Q. What are they?

A. Attorneys. They had been our regular attorneys in Oakland. In which they advised that——

Q. (By Mr. Hecht). And did you act in accordance with that advice?

A. We did.

Q. Directing your attention to Section 3 of the contract, were you advised that you had to comply with the terms of that Section 3 strictly?

A. We were.

Q. Were you further advised that you could not set yourselves up to judge the justice of putting these men in bad standing?

A. We were.

Q. And you acted accordingly?

A. We did so." (R. 726-727.)

The foregoing proves beyond doubt Petitioner's motive was entirely innocent when it failed to weigh or evaluate the conflicting evidence before it.

"The maxim that ignorance of the law excuses no one is not so broad in its application that a mistake of law cannot be shown in evidence for the purpose of ascertaining the state of one's mind or one's motive."

Schott v. Dosh (1896), 49 Nebr. 187, 196, 197, 68 N. W. 346, 350, 59 Am. St. Rep. 531, at p. 538.

It is submitted, therefore, that the Board has not only relied on an invalid presumption to charge the petitioner with bad faith but also has disregarded evidence in the record which establishes beyond doubt that its motives were innocent.

(b) The Board cannot sustain its finding by rejecting the uncontradicted testimony of Petitioner's officers respecting their inability to ascertain the true motives of the reasons of the CIO.

We submit that there is nothing in the record which shows that the testimony of Petitioner's officers respecting their inability to ascertain the true motivation of the CIO is inherently improbable or has been impeached. We also submit that the Board has pointed to nothing which indicates impeachment or improbability, except for its conclusionary finding of lack of good faith which is, as we know, based on an

invalid presumption. Nevertheless, the Board, in its decision, states:

“Unlike the Trial Examiner, we do not view the conclusionary testimony by various representatives of the respondent, to the effect that the respondent did not ‘know’ that this was the C.I.O.’s motive, as establishing the respondent’s lack of knowledge of such motive.” (R. 76.)

In failing to credit this testimony, the Board is in fact presuming the liability and the bad faith of these persons, or it has, at best, chosen to draw from facts equally susceptible of a contrary inference, the inference that the Petitioner’s officers were acting in bad faith. Basically the fact is that the Board has found the Petitioner guilty of bad faith and not worthy of belief because its officers were unfortunate enough to arrive at conclusions different from those of the Board. If the reasoning of the Board were valid, all first instance tribunals could be stigmatized as being not in good faith whenever Appellate Courts have differed with them as to the conclusions that may be drawn from a given set of facts. If this were true, the Board’s own position would be unenviable. We contend in view of the Board’s erroneous premise that there is nothing in the record justifying its rejection of this testimony. We also contend that under well established rules of law, the Board should have accepted this uncontradicted testimony and found that the Petitioner did not know the true reasons motivating the CIO.

It is clear that in the absence of impeachment or inherent improbability that the trier of the facts

may not indulge in an inference when the inference is rebutted by clear, positive and uncontradicted evidence. (*Hicks v. Reis* (1943), 21 Cal. (2d) 654, 660, 661, 134 Pac. (2d) 788, 791.) The testimony of Petitioner's officers was that due to the many legal causes which the CIO had for suspending its members, it could not ascertain whether it was actuated by proper or improper motives. We submit that this testimony was clear, positive and uncontradicted and that it may not be rejected in favor of an invalid inference having its origin on a prohibited presumption.

In addition, the Board never overcame the presumption of good faith and fair dealing which accompanied Petitioner through every stage of this proceeding.

“For, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, *it is the express duty of court or jury to draw the inference favorable to fair dealing.*” (Italics ours.) (*Ryder v. Bamberger* (1916), 172 Cal. 791, pp. 799-800, 158 Pac. 753, 756; see also *U. S. v. Calif. Midway Oil Co.* (1919), 259 Fed. 343, pp. 352, 353.)

The findings of the Board as to the CIO's alleged illegal motivation must be rejected because the record discloses that the CIO had a compelling and valid reason for requesting a discharge of its delinquent members.

We offer in support of our argument on this phase of the case, the comments of the Trial Examiner on the conduct of the CIO and its delinquent members.

We believe that they reflect the only valid and the only reasonable conclusions which an unbiased appraisal of the uncontradicted facts could achieve.

“It may be reasonably argued that the respondent’s knowledge was immaterial in the case of the stewards, and that the Union would be justified in expelling and the respondent in discharging them even though their ‘bad standing’ in the C.I.O. was founded on dual unionism alone. This view takes cognizance of the difference in the degree in loyalty owed by a functionary of a union and a rank and file member, and the strategic position which a steward or an officer occupies in the administration of a union. *As has been found, the stewards here were charged and found guilty eventually by the C.I.O. of sabotaging the policies of the international organization.* It may well be that if a steward or other functionary of a labor organization seeks to supplant that organization with a competing labor organization, he should first resign his office, and that if he does not, but engages in dual unionism, the first union may expel him even though by so doing it places him in the line of discharge by the employer.” (R. 55-56; italics ours.)

“That the contracting union might properly discipline members for participating in a strike called in violation of union policy, by suspending or expelling them, seems to the undersigned hardly open to question. A labor organization, no less than any other organization, cannot be denied the authority to compel compliance with the decisions of its membership. ‘Good standing’ in an organization implies something more than the mere payment of dues.” (R. 63.)

With this view of the facts in mind, the following taken from *Wyman-Gordon Co. v. N.L.R.B.* (1946, CCA 7th), 153 Fed. (2d) 480, p. 489, is entirely applicable in judging the CIO's conduct:

“We think it is unnecessary to discuss further the circumstances connected with the discharge of Coale and Crince. They have all been considered and we are unable to agree that there is any substantial basis for the conclusion that they were discriminatorily discharged. *It is almost inconceivable to think that petitioner in order to rid itself of these admitted troublemakers (and this includes Baker) would have resorted to a violation of the Act when it had numerous justifiable reasons for their discharge.* The record overwhelmingly discloses, with no evidence of any probative value to the contrary, that the discharge of Baker, Coale and Crince was not only justified but required.” (Italics ours.)

It is evident that the activity of the discharged employees could have resulted in something more than just the loss of bargaining rights at petitioner's plant in so far as the CIO was concerned. It could have resulted in the sabotaging of policies valued by the majority of its members with the consequent loss of morale and authority, which if allowed to go unchecked could have developed in the total destruction of the Union.

In view of these compelling circumstances, it must be conceded that the Board's findings are acceptable only if it is held that when a partisan of the AFL was discharged, the fact of his partisanship raises a pre-

sumption that the ground assigned for his discharge was a false one. That such a presumption may not be relied upon is clear.

“When it is further considered that during the period in question, when these discharges occurred, from April 1, 1937, to August 21, 1937, 74 employees were discharged or laid off by respondent, of which only 24 were members of United, *and that in each case of a discharge, the reason given for it really existed, it is clear that the finding of the Board that that reason will not be accepted as the real one but must be recognized as a pretext, is based entirely on suspicion and amounts in effect to the holding that when a United man commits a fault and is discharged, the fact of his Unionism raises a presumption that the ground assigned was a false one.* Matters of this kind may not be decided on suspicion, surmise and feeling, rather than on evidence, and findings resting on these bases may not stand.” (Italics ours.) (*N.L.R.B. v. Goodyear Tire & Rubber Co.* (1942, CCA 5th), 129 Fed. (2d) 661, at p. 667.)

It is uncontradicted that all of the discharged employees in some fashion participated in the strike, and that the CIO found them guilty of undermining its policies, including the policy against wartime strikes. Under such circumstances, the Board is not justified in resting its findings on suspicion and surmise, particularly in view of the fact that many employees who participated in permissible AFL activity were not disturbed by the CIO and remained in the petitioner's employ. (R. 736-738.)

CONCLUSION.

The basic question as to whether the Board has acted in excess of its powers in prohibiting the coercion of employees by labor organizations, in regulating the internal affairs of unions and in forbidding the performance of valid "closed shop" contracts, is one which this Court has already decided adversely to our views in *Local 2880, etc. v. N.L.R.B., supra*. We trust, however, that the Court will, after considering the arguments and authorities urged in support of our position, rule in harmony with the decisions of the Seventh Circuit.

Should the Court again uphold the views of the Board on this question of law, we feel confident, nevertheless, that the Court will rule the doctrine of the *Rutland Court Owners* case, *supra*, to be inapplicable to the facts disclosed by the record.

The Board by its decision in the instant case, cuts across well-established principles of law and forces upon the Petitioner the functions of a trial judge without first having furnished it any rules or standards to guide it in the exercise thereof. The Board not only requires the Petitioner to take on the attributes of a judge, but also imposes upon it extraordinary and eccentric duties both as judge and as obligor under an admittedly valid contract.

First, it requires the Petitioner to evaluate and weigh evidence, but fails to state whether the Petitioner is authorized, as was the Board, to draw "either of two inconsistent inferences from the evidence" and

to base a finding on the one so selected, or whether it should have, as judges ordinarily do, found that since the proven facts gave equal support to inconsistent inferences, that the illegal motivation of the CIO had not been established. Under either of these rules or standards the Petitioner would have been entitled to find that the CIO was not motivated by a desire to coerce its members, but it is evident that the Board does not intend to permit the Petitioner to exercise its duties of weighing and evaluating the evidence under either of these standards, and that it is punishing the Petitioner because it drew from the proven facts a reasonable inference, inconsistent, however, with that drawn by the Board. This we submit is arbitrary and capricious and without any support whatsoever in the National Labor Relations Act.

Second, it requires the Petitioner before it performs a valid contract to probe the state of mind and the mental processes of the obligee, all contrary to the well-established principle of law that a malicious motive does not convert the exercise of a legal right into actionable conduct.

Third, it compels the Petitioner to declare a valid contract unenforceable because, as obligor it is alleged to have knowledge that the obligee intended by means of the contract to violate some law or public policy, all contrary to the well-established principle that it is no defense to the performance of a contract that the obligor knows that the agreement or its performance might aid the obligee to violate the law,

Not satisfied with burdening the Petitioner with this impossible task, the Board culminates its arbitrariness by casting upon the Petitioner the stigma of not being in good faith because it did not foresee that the Board by administrative fiat would cast upon it such extraordinary duties and would formulate such novel and eccentric rules and standards.

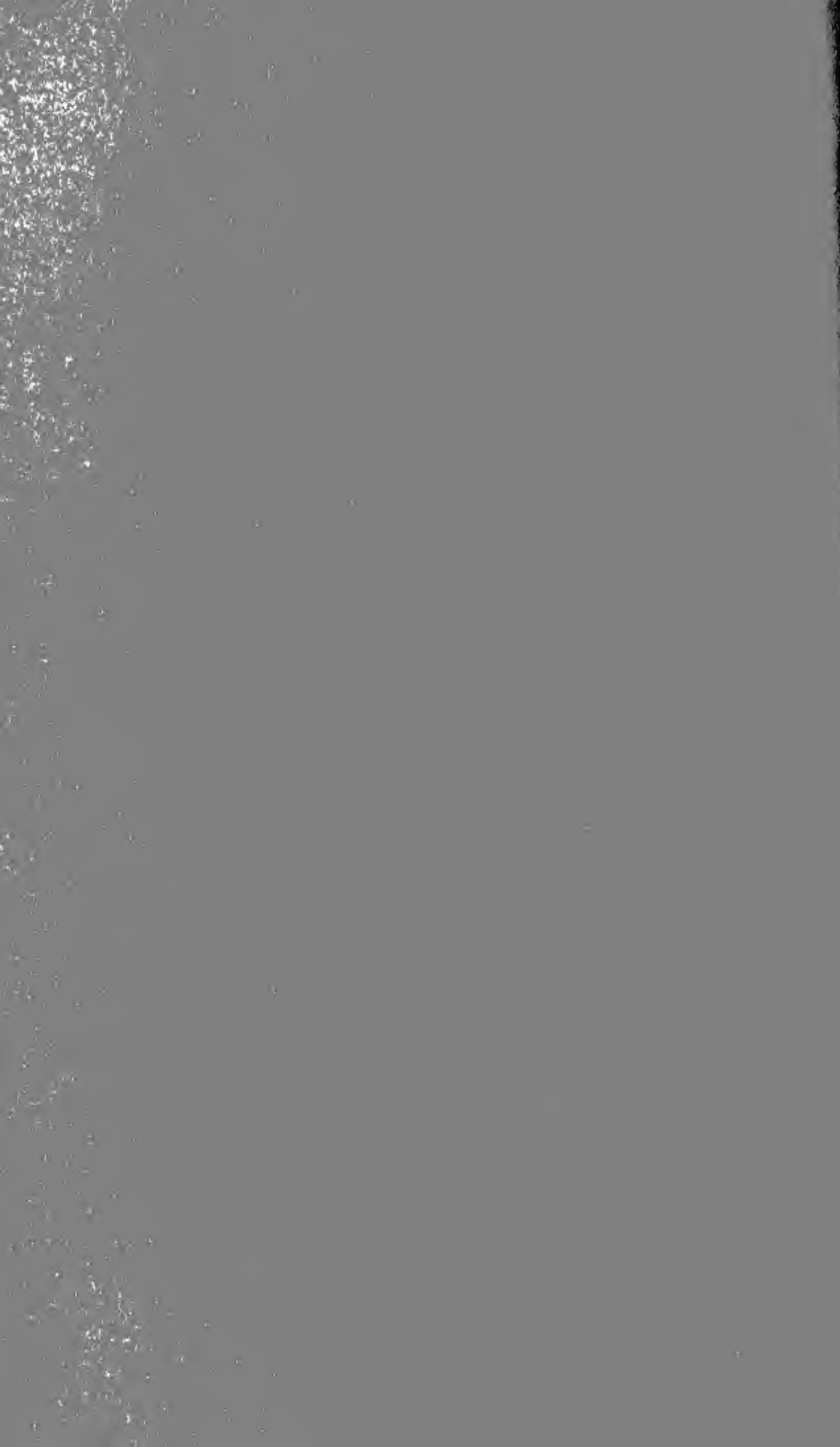
We submit, therefore, that the decision and order of the Board herein is arbitrary, constitutes an abuse of discretion, is in excess of its powers, and deprives the Petitioner of property without due process.

Dated, San Francisco,
April 20, 1948.

Respectfully submitted,
PHILIP S. EHRLICH,
BARTLEY C. CRUM,
R. J. HECHT,
Attorneys for Petitioner.

(Appendix Follows.)

Appendix.



Appendix

Testimony of Albert Zulaica.

“The Witness. Well, he says, ‘I think that you fellows have been misled,’ he says, ‘because we can throw you people out of wearing those AFL buttons.’ I said, ‘Well, you can’t do that.’ I said, ‘If you start doing that you will have to throw the majority out because most of them are wearing an AFL button.’

Trial Examiner Ruckel. Most of them what?

The Witness. Most of them wearing AFL buttons.

Trial Examiner Ruckel. In the plant?

The Witness. In the plant, yes. Then he says, ‘We don’t have to do that.’ He says, ‘We can pick some of you out, throw you out and claim that you were leaders, and that will scare the rest of them.’ And I said, ‘Well, we don’t scare so very easy as all that.’ I says, ‘You will have to throw all of us out before we will ever stop,’ I said, ‘because most everyone here is fed up with the CIO.’

Then he says to me, ‘Are you an enemy of the CIO?’ and I said, ‘No, I am not. I praise the CIO, they have a very good policy,’ I said, ‘but it is the officers of that local that makes it so hard for us to get along.’ And then he says, ‘Then you won’t change your mind?’ and I said, ‘No, absolutely not, not until you people at the office do the right thing for us.’

* * * * *

Q. (By Mr. Royster) Now, did you report this conversation to anyone?

A. I couldn't report that conversation right then because there were no officials of the company present at the time. They had all gone home. But on Monday morning I reported it to Mr. Mason.

Q. And who is Mr. Mason?

A. He is the foreman of the Toilet Department.

Q. *Well, what did you tell Mr. Mason?* I don't want you to necessarily give the exact words of what you told him, but what portion of this conversation, if not all of it, did you report to Mr. Mason?

A. Well, what I really wanted to find out at the time was—like I said to Mr. Mason, that I wanted to know if those people had a right to come in the plant any time they felt like it. And I said, 'I would like to have you talk to Stanberry, or Altman, and find out what it is all about.' *That is all I said to Mason.*

Q. Well, did you have any further conversation with Mr. Mason?

A. He came to me about two or two and a half hours later, and he told me that he had spoken to Mr. Stanberry and that Stanberry said that the reason we were having so much trouble was because we were wearing AFL buttons. * * *

Q. (By Mr. Royster) Well, did you have any conversation with Mr. Stanberry?

A. Well, just a few words. I think it was in the afternoon.

Q. Of what day?

A. That same day, that Monday, August 13.

Q. All right.

A. He was coming from the Seafoam Department, and he was in kind of a hurry, and I asked him if I could have a word with him. And I will say this much for him, he always stopped to listen to anyone that wants to talk to him even if he is in a hurry. So he stopped. Then I told him, I said, 'Did Mason talk to you?' He said, 'Yes,' he says, 'and I think all your trouble is because you are wearing those buttons. If you take them off you won't have that trouble, see. You can keep that in your heart and take your buttons off. They could never take that out of your heart if you wanted to go into another union.' And he just went by." (R. 310-311-312.)

Testimony of Don E. Stanberry.

"Q. During the month of August did Mr. Zulaica come to you with a complaint about having been threatened for wearing an AFL button and electioneering for AFL?

A. Perhaps, direct; either directly or indirectly. I don't remember whether it was directly from him or through his foreman.

Q. Do you recall the nature of the complaint?

A. Well, the complaint was that Charles Leacock and other identified colored people were threatening the men at night.

Q. Was the reason for the threat given you?

A. I believe they stated it was connected with wearing AFL buttons.

Q. Did you take any action in connection with that?

A. I did not.

Q. Did you speak to Mr. Zulaica about the matter?

A. Yes, I did.

Q. By the way, what was Mr. Leacock's position?

A. Mr. Leacock was porter, and he was also a CIO steward.

Q. I take it Mr. Leacock did not hold any foreman's position, any supervisory position?

A. He held no supervisory position whatsoever.

Q. Did you hold a conversation with Mr. Zulaica with respect to his dealings with Mr. Leacock?

A. Yes, I did.

Q. And will you give us the burden of the conversation?

A. Well, it was more in the nature of a request from Zulaica for advice as to what to do in the situation, the general situation as well as this particular incident. And I went over the whole situation with him from beginning to end, and pointed out that the best legal advice we had been able to obtain substantiated the fact that our present CIO contract was valid, and that that required that anyone working for the company would have to be a member of the CIO Union, and also be in good standing. I also pointed out that what meant to be in good standing we did not know, and the union had never told us the exact reason for the previous dismissals or suspensions, I should say, other than that they were not in good standing.

Q. Did you advise him that Mr. Leacock had as much a right to express an opinion in the controversy as anybody else?

A. That is quite true.

Q. Did you advise him to avoid controversy with Mr. Leacock?

A. Well, I told him the best thing was to try to smooth it over as easily as he could." (R. 717-718.)

**In the United States Court of Appeals for the
Ninth Circuit**

COLGATE-PALMOLIVE-PEET COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

**INTERNATIONAL CHEMICAL WORKERS UNION, A. F. L., ET AL.,
INTERVENORS**

and

**WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO), INTERVENOR**

and

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COLGATE-PALMOLIVE-PEET COMPANY, RESPONDENT

**ON PETITION TO REVIEW AND SET ASIDE AND ON REQUEST
FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

SEP 14 1948

PAUL P. O'BRIEN,

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In the United States Court of Appeals for the Ninth Circuit

No. 11514

COLGATE-PALMOLIVE-PEET COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

INTERNATIONAL CHEMICAL WORKERS UNION, A. F. L., ET AL.,
INTERVENORS

and

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION (CIO), INTERVENOR

and

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COLGATE-PALMOLIVE-PEET COMPANY, RESPONDENT

*ON PETITION TO REVIEW AND SET ASIDE AND ON REQUEST
FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition
(R. I, 101-126)¹ of Colgate-Palmolive-Peet Company,

¹ "R" refers to the printed transcript of record. The roman numerals preceding the comma refer to the volume of the printed record in which the reference appears. The arabic numerals following the comma refer to the pages of the volume of the printed record in which the reference appears.

herein called the employer, to review and set aside an order issued by the Board against the employer on September 6, 1946, pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*).² In its answer to the petition, the Board has requested that its order be enforced (R. I, 134-142). The jurisdiction of this Court is based upon Section 10 (e) and (f) of the Act and the Act, as amended, the unfair labor practices having occurred at the employer's plant in Berkeley, California, within this judicial circuit.³ On February 17, 1947, pursuant to their respective requests (R. I, 144-150, 151-155), this Court entered an order permitting the intervention in this proceeding of International Longshoremen's and Warehousemen's Union, Warehouse Union No. 6, C. I. O. herein called the C. I. O., International Chemical Workers Union, A. F. of L., herein called the A. F. L., and named individuals whom the Board's order requires the employer

² The National Labor Relations Act, herein called the Act, was amended by Section 101 of Title I of the Labor Management Relations Act, 1947, effective August 22, 1947 (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141 *et seq.*). Section 101 of Title I is herein called the Act, as amended (Sec. 17, the Act, as amended). Relevant portions of the Act and the Act, as amended, appear in the Appendix, *infra*, pp. 68-76.

³ The employer, a Delaware corporation, operates numerous plants throughout the United States, including its plant at Berkeley, California, where it manufactures and sells soap and glycerin. The employer's operations entail substantial purchases and sales in interstate commerce (R. I. 177, 5, 10). As the employer concedes (Br., p. 23), no jurisdictional issue is presented.

to reinstate with back pay (R. I, 143-144).⁴ The Board's decision and order (R. I, 68-85) are reported in 70 N. L. R. B. 1202.

STATEMENT OF THE CASE

I. The Board's findings of fact

The facts in this case relate to the employer's discriminatory discharge of and refusal to reinstate thirty-seven named employees in violation of Section 8 (1) and (3) of the Act. The illegality of the employer's conduct lies in its discharge of and refusal to reinstate the employees pursuant to a closed-shop contract, when, to the employer's knowledge, the contracting union requested the discharges under the contract because the employees engaged in rival union activities during a period when it was appropriate for the employees to seek a change of bargaining representatives. The Board's decision rests upon the rationale expressed by it in *Matter of Rutland Court Owners*⁵ which was approved by this Court in *Local No. 2880 v. N. L. R. B.*⁶

The thirty-seven named employees comprise three groups of employees who may for the sake of con-

⁴ In its brief (pp. 21-22), the employer renews its objection, previously made in its answer to the request for intervention (R. I, 159-160), to the intervention of the A. F. L. and the named individuals. Permissive intervention is a matter within the Court's sound discretion. The Board does not oppose the intervention of the A. F. L. and the named individuals and believes it to be appropriate in view of the permitted and unopposed intervention of the C. I. O.

⁵ 44 N. L. R. B. 587; 46 N. L. R. B. 1040.

⁶ 158 F. 2d 365 (C. C. A. 9), cert. granted, 331 U. S. 798, cert. dismissed on motion of petitioner, 332 U. S. 845.

venience be designated as (1) the five C. I. O. stewards, (2) the four Employees Welfare Association committeemen, and (3) the twenty-eight additional employees. The five stewards, as the elected representatives of the plant employees at the employer's plant in Berkeley, California, were responsible for the day-to-day administration of a closed-shop agreement to which the C. I. O. was a party, and spearheaded a movement to oust the C. I. O. as bargaining representative. The four committeemen were plant employees who played a prominent role in the rival movement, and who were the elected officers of the Employees Welfare Association, an interim organization formed to oppose the C. I. O. The twenty-eight additional employees were active participants in the campaign to depose the C. I. O. and to establish the A. F. L. as bargaining representative. The Board determined that as a matter of law the closed-shop contract did not preclude the employees in question from engaging in rival union activity at the time they did so and found as ultimate facts (1) that the C. I. O. sought to use the closed-shop contract for the purpose of punishing the employees for engaging in such rival union activities, and (2) that, although the employer had knowledge that the C. I. O. had suspended the employees from membership because of their rival union activities, the employer acceded to the request of the C. I. O. that the employees be discharged under the closed-shop contract. The pertinent facts, as

found by the Board and as shown by the evidence, may be summarized as follows:⁷

A. The closed-shop agreement between the employer and the C. I. O.

On July 9, 1941, the employer and the C. I. O. entered into a contract covering the production and maintenance employees at the Berkeley plant, embracing the usual terms of a collective agreement, and providing that it was to "remain in effect unless and until changes become necessary because of conditions beyond the control of the Company or are requested by the employees through their representatives" (R. I, 69, 23-25; R. III, 788). Section 3 of the agreement embodied a typical closed-shop provision requiring that new employees be hired through the offices of the C. I. O., or in the event that the C. I. O. was "unable to furnish competent workers" that new employees apply for membership in the C. I. O. within fifteen days of their employment, and further requiring as a condition of employment that employees "be members in good standing" of the C. I. O. (R. I, 69, 24; R. III, 787-788, R. I, 223). On July 24, 1945, a supplemental agreement was entered into which extended the 1941 contract by providing that that contract should "remain in full force and effect" pending the approval or disapproval by the Tenth Regional War Labor Board of certain changes (R. I, 69, 25; R. III, 788-789, R. I, 223).

Local 6 of the International Longshoremen's and Warehousemen's Union admitted to membership em-

⁷ Where, in a series of references, a semicolon appears, the references preceding the semicolon are to the Board's findings, succeeding references are to the supporting evidence.

ployees of other employers (R. I, 26, n. 5; R. I, 187). None of its officers were employees of the Colgate-Palmolive-Peet Company and the contract with that Company was administered by five plant stewards who were employees (R. I, 218-220, 286). In July 1945 the five C. I. O. plant stewards were Haynes, Luchsinger, Marshall, Moreau and Smith (R. I, 26; R. I, 193).

B. The employees' dissatisfaction with the C. I. O. and the preliminary steps taken by them to change representatives

Dissatisfaction with the representation accorded them by the C. I. O. had been brewing among the employees for about six months before the extension of the closed-shop agreement (R. I, 25; R. I, 225-226, 209). During this period, the five plant stewards, elected by the employees to handle the day to day administration of the agreement (R. I, 218-220, 286), expressed their discontent with the C. I. O. officials to Charles Wood, the employer's Labor Relations Director (R. III, 758-759). On July 20, 1945, four days before the execution of the extension of the collective agreement, Steward Marshall in a conversation with B. W. Railey, the employer's vice-president (R. I, 181), asked that the five stewards be present when the extension was signed because of impending labor troubles at the plant due to the employees' unrest (R. I, 188-189, 225-226).

Some time in July, the five C. I. O. stewards contacted District 50 of the United Mine Workers of America and discussed with its representatives the possibility of transferring the affiliation of the Com-

pany's employees to that organization (R. I, 25-26; 190, 209, 237-240). On July 26, 1945, the five C. I. O. stewards for the purpose of organizing employee sentiment into effective action in opposition to the C. I. O., arranged a dinner attended by the five stewards and some twenty-four additional employees (R. I, 26; R. I, 189-191, 208-210, 255). At this dinner those present decided to call an open meeting on July 30, 1945, for the employees at large, to discuss a change in bargaining representatives to be undertaken initially by the formation of a temporary organization known as the Employees Welfare Association (R. I, 26; R. I, 189-191, 208-210, 255). On July 28, 1945, a "notice of meeting" was posted on the bulletin boards throughout the plant inviting "all those interested in joining Employees Welfare Association" to be present at a neighboring meeting hall "at 4:15 p. m., Monday, July 30, 1945" (R. I, 69, 27; R. I, 191-192, 255-256). On the same day, Superintendent Altman knew of the posting and, upon receiving a telephone call from Labor Relations Director Wood asking "if anything unusual had happened," told him of the notice (R. III, 667-668, R. I, 255-256). Thereafter Steward Luchsinger and employee Olsen visited Superintendent Altman at his office, and obtained Altman's agreement to shut down the plant for two hours so that the night shift employees could attend the meeting (R. I, 69-70, 2; R. I, 268-269). The Board concluded that the employer would not have authorized so important an interruption in the plant's operations without ascertaining the purpose of the meeting (R. I, 69-70, 77).

C. The employer, knowing the C. I. O.'s discriminatory purpose, accedes to the C. I. O.'s request to discharge the stewards and the committeemen for their leadership of the rival union activities

On July 30, 1945, the same day for which the rival organizational meeting was scheduled, the C. I. O. requested and obtained the discharge of the five stewards who were leading the employees' organizational efforts (R. I, 70, 29; R. III, 806-807, R. II, 654-656). In the early afternoon of that day, four C. I. O. officials, who were not employees of the Company, called upon Superintendent Altman at his office (R. I, 27; R. III, 667). The C. I. O. officials handed Superintendent Altman a letter which requested the discharge of the five duly-elected plant stewards, including Steward Luchsinger who had obtained Altman's agreement to shut down the plant. The letter stated "that charges have been preferred" against these employees "and that they have been suspended from membership" in the C. I. O. "pending a trial" (R. I, 27-28; R. III, 668-669, 784-785, R. I, 259, 256). Superintendent Altman hurried to Vice President Railey's office (R. III, 669). The two returned to Altman's office (R. II, 522, R. III, 669), and the five stewards were summoned (R. III, 670, R. II, 524). Vice President Railey thereupon discharged the stewards, informing them that under the terms of the closed-shop agreement he was obliged upon demand to terminate their employment until they were restored to good standing by the C. I. O. (R. I, 70, 29; R. I, 194, 256-257, 288-289). Each of the stewards was given a letter by the C. I. O. officials (R. I, 29; R. II, 525, 670, R. I, 193). The stewards there-

upon left Altman's office (R. I, 29; R. I, 195, R. II, 525, R. III, 670-671). The letters notified the stewards that they were suspended from membership in the C. I. O. pending a union trial upon unspecified charges alleging the violation of the C. I. O.'s Declaration of Principles, Oath of Membership, and Article 9, Section 1, of the C. I. O. Constitution and By-Laws, all of which are platitudinous in nature (R. I, 70; R. III, 847-848, R. I, 229, R. III, 853-856, R. II, 617).

Immediately following the discharge of the five stewards, the C. I. O. representatives distributed throughout the plant a bulletin reading (R. I, 70, 31-32; R. I, 256, R. III, 785, R. I, 259):

ATTENTION

All Warehouse Union Members:

An illegal meeting has been called by certain employees of Peet's now under suspension as members of this union for violation of the membership oath, and other illegal acts.

WARNING

Any member of Local 6 who attends such illegal meeting or participates in violations of our constitution, does so at the risk of losing membership and employment.

General Executive Board
Warehouse Union
Local #6, I. L. W. U.

That afternoon, according to Vice President Railey, the factory was "in a state of turmoil due to the fact of a lot of conversation and visiting, and union people going through the plants, and people couldn't get their work done" (R. I, 36; R. II, 528).

Of the 313 production and maintenance employees (R. I, 61, n. 30; R. II, 421-422), more than 200 attended the scheduled anti-C. I. O. meeting (R. I, 70, 32; R. I, 196, 256). Two major decisions were made. It was unanimously resolved to break relations with the C. I. O. and to form an independent union, known as Employees Welfare Association, until affiliation with a strong international union could be accomplished (R. I, 70, 32; R. I, 196, 200-201, 261, 288, R. III, 848, R. I, 259). It was also unanimously agreed that four employees, Thompson, Sherman, Lonnberg, and Olsen, designated committeemen and elected to act as officers of the interim organization, should seek the reinstatement of the discharged stewards, and that should they fail in their quest, all the employees would in protest cease working (R. I, 70, 33; R. I, 196, 199, R. III, 849, R. I, 259). Upon the close of the meeting the four committeemen dispatched the following telegram to Vice President Railey (R. I, 70-71, 34; R. I, 257, R. III, 786-787, R. I, 259):

You are hereby notified of action taken by more than 200 employees of Colgate Palmolive Peet Co All being former members of ILWU 1-6 and being more than 50 percent of total employees have withdrawn and severed relations with ILWU-6 as collective bargaining agent.

EMPLOYEES WELFARE ASSOCIATION
By NEGOTIATING COMMITTEE
E. H. THOMPSON,
WILLIAM SHERMAN,
H. LONNBERG,
L. OLSON

A telegram of similar purport was sent to the C. I. O. (R. I, 33-34; R. I, 257, R. III, 786, R. I. 259).

On the following morning, July 31, 1945, the four committeemen called upon Vice President Railey at his office, and unsuccessfully urged the reinstatement of the five discharged stewards (R. I, 71; R I, 257, R. II, 360-361). Railey persisted in his position that under the 'closed-shop agreement he had no choice but to comply with the C. I. O.'s demand (R. I, 34; R. I, 257). He was told that he would shortly receive a telegram indicating the employees' wish that the C. I. O.'s authority to act on their behalf be terminated, and during the conversation the telegram which had been dispatched the previous evening was in fact received by Railey (R. I, 71, 35; R. II, 368-369, 377-378).

Meanwhile, Superintendent Altman joined the conference stating that a group of C. I. O. officials were presently in his office (R. I, 35; R. II, 527). They were invited into Railey's office (R. I, 35; R. II, 361, 527). An acrimonious debate ensued between Committeeman Sherman and C. I. O. President Lynden during which Lynden sought to justify the C. I. O. wage policy (R. I, 35; R. II, 545-546, 528). Vice President Railey in his testimony agreed that "it became quite apparent as this conversation took place that there was a schism developing in the ranks of the C. I. O." (R. II, 545-546). Indeed, at this very conference, the C. I. O. officials, in the presence of the employer's ranking officials, bluntly informed the four committeemen that suspension notices for three

of them were already in preparation (R. I, 71; R. I, 263-264), and requested the name of the fourth one, Olsen, so that they could prepare such notice for him. Later that morning the employer received a formal request from the C. I. O. notifying it of the suspension of Thompson, Sherman, Lonnberg, and Olsen from membership in the C. I. O. and requesting their discharge (R. I, 71, 36-37; R. III, 673-675, 846-847).

That same morning, C. I. O. representatives circulated another bulletin among the employees at the plant (R. I, 71, 37; R. I, 257). The leaflet warned the employees against aligning themselves with "Sherman-Marshall-Lundeberg & Co.," lest they jeopardize "their own reputation, their union standing, their seniority, and their jobs," and pointedly referred them to "the provisions of the union contract, including the requirement that only members of Warehouse Union, Local #6, ILWU, in good standing may be employed by the company" (R. I, 71, 37-38; R. III, 789, R. I, 259). Despite this warning, a majority of the employees, upon learning of the refusal to reinstate the five stewards, at noon left the plant in order to hold a second anti-C. I. O. meeting (R. I, 71, 38; R. I, 257). Vice President Railey, who attended the meeting upon invitation, addressed the employees, stating that the reinstatement of the stewards was impossible because of the employer's contractual obligation under the collective agreement (R. I, 72, 38-39; R. I, 257-258, R. II, 529-531). Dissatisfied with Railey's explanation, and having failed in their effort to secure the reinstatement

ment of the stewards, the employees in protest voted to reaffirm their resolution not to return to work (R. I, 72, 38-39; R. I, 202, 258, 266, R. III, 850-851, R. I, 259). The strike lasted two and one-half days, and most of the workers participated in it (R. I, 72, 39; R. III, 677, R. II, 533).

Two days later, on August 2, 1945, a third anti-C. I. O. meeting was held, again attended by a substantial majority of the employees, at which it was voted to dissolve Employees Welfare Association, to affiliate with International Chemical Workers Union, A. F. L., herein called the A. F. L., and to return to work the following morning pending an election among the employees to be requested of the National Labor Relations Board (R. I, 72, 40; R. I, 258, R. III, 851-852, R. I, 259). The next morning, all the employees returned to work except the five stewards, who had been previously discharged, and the four committeemen, who had been told the day before by Superintendent Altman that in view of their suspension it would be futile for them to report to work (R. I, 72, 39-40; R. I, 258, 266-268, R. II, 378, R. III, 806-807, R. II, 654-656).

D. The employer's knowledge of events preceding its refusal to reemploy the stewards and the committeemen and its discharge of the twenty-eight additional employees at the C. I. O.'s request apprising the employer of the C. I. O.'s discriminatory purpose

The initial organizational efforts of the insurgent employees culminating in the discharge of the stewards and the committeemen at the C. I. O.'s request were followed by intensified organizational efforts to which the C. I. O. retaliated with further discharge-

demands under the closed-shop contract. The events preceding its accession to the C. I. O.'s demands furnished the employer with additional information apprising it of the C. I. O.'s discriminatory purpose.

1. The employer's knowledge of events relating to formal Board proceedings dealing with the rival union activities

Upon the completion of affiliation with the A. F. L., steps were undertaken by it to secure a change of representatives by resort to formal Board process. On August 3, 1945, the A. F. L. filed a petition for the investigation and certification of representatives. On August 8, 1945, the A. F. L., the C. I. O., and the employer met informally to discuss the petition at a preliminary conference at the Board's regional office in San Francisco. Notice of formal hearing was issued on August 14, 1945, was received by the employer on August 17, 1945, and the hearing was held on August 22, 1945 (R. I, 72, 73, 41, 45; R. II, 549-552; R. III, 799-805).⁸

In addition to the A. F. L.'s invocation of the Board's election machinery to resolve the representation question, the A. F. L. invoked the Board's processes for the redress of unfair labor practices in order to remedy the dismissal of the stewards and

⁸ Pursuant to the Board's Decision and Direction of Election issued on September 26, 1945, an election was held on October 16, 1945, at which the A. F. L. was defeated 181 to 126 (R. I, 75; R. II, 549-552, R. III, 799-805). Thereafter, upon objections to the election filed by the A. F. L., the election was set aside by the Board because the employer's discharge of employees at the C. I. O.'s request for protected union activities prevented the result of the election from being truly representative of the employees' untrammelled wishes (R. I, 75, 79, 83).

the committeemen. On August 13, 1945, the A. F. L. verified, and the next day filed, the original charge alleging the discriminatory dismissal of the stewards and the committeemen (R. I, 72; R. I, 92-93). Because of the Board's practice promptly to inform persons of charges filed against them, the Board inferred that the employer was apprised of this charge by August 17, 1945 (R. I, 77-78). The employer admittedly knew of it on August 22, 1945 (R. I, 107).

2. The employer's knowledge of the C. I. O.'s retaliatory campaign

Upon the employer's notification on August 8, 1945, of the filing by the A. F. L. of a petition for certification of representatives, Vice President Railey agreed that it was readily apparent that a campaign for the employees' favor was being conducted by the A. F. L. and the C. I. O. (R. I, 72; R. II, 547). Labor Relations Director Wood in his daily tours of the plant was handed union literature which was being circulated in profusion throughout the plant, and he observed the A. F. L. buttons which the employees were wearing on their work clothes (R. III, 759-761). This campaign was open, widespread, and intense (R. I, 72, 41; R. I, 299-301, 305-314, 330-332, R. II, 344, 387-388, 391-394, 411-414, 430-431, 433-436, 438-439, 475-478, 481-488, 516, 564, 566, 580-581, 583-584, 592-594, 598, 607, 608-612, 631-632, 642, R. III, 785, 789-790, R. I. 259, 794-798, 808-847). The C. I. O., in the conduct of its campaign, both orally and through leaflets, made clear that the price of adherence to the A. F. L. was discharge under the closed-shop contract (R. I, 72, 77, 43-44; R. I, 299-300, 305-314,

R. II, 438-439, 475, 481-488, 516, 564, 580-581, 592-594, 598, 608-609, 631-632, 642, R. III, 785, 789-790, R. I, 259, R. III, 794-798; R. II, 476-477). Aware of the C. I. O.'s retaliatory campaign, Labor Relations Director Wood conceded that he knew that the C. I. O.'s subsequent discharge demands were motivated in part at least by the "union activities" of the A. F. L. adherents (R. I, 78, 49; R. III, 737).⁹ Illustrative of the C. I. O.'s campaign was its leaflet, widely distributed throughout the plant and posted on a plant bulletin board on August 22, 1945, the day of the hearing on the A. F. L.'s election petition, warning the employees of discharge for pro-A. F. L. or anti-C. I. O. activity (R. I, 73; R. III, 796, 798, R. II, 476-478). The leaflet read in part:

* * * * *

6. Only members of the Warehouse Union, Local 6, work at Colgate Palmolive Peet Company. If anyone says different—let him test it.

⁹ It is unlikely that any notable aspect of employee thinking escapes managerial attention. In the discharge of their managerial duties. Superintendent Altman and Labor Relations Director Wood, top-ranking officials at the employer's Berkeley plant (R. I, 180-182), made daily tours of the plant (R. III, 696-697, 757-758). One of the bulletin boards upon which employees post notices is in the immediate vicinity of the offices of the managerial staff (R. I, 191-192). Superintendent Altman passes by this bulletin board several times each day, and generally reads any new notices placed on the board (R. III, 686-687). In making his daily rounds Labor Relations Director Wood occasionally talks with the employees (R. III, 758), observes the matter placed on the various bulletin boards (R. III, 759), and during the course of the union electioneering received union literature (R. III, 759-760). Lesser supervisory officials, being in more immediate contact with the employees, necessarily have an even more intimate knowledge of employee opinion.

7. Any Peet's employee reported as trying to get people to bolt the C. I. O. and join the A. F. L. or wearing an A. F. L. button, will be taken off the job.

* * * *

10. As a result of the investigation last week, we have found it necessary to consider the removal of several more of the ringleaders who have violated all of our rules.

* * * *

We suggest: If you value your future at Colgate Palmolive Peet; if you enjoy your present job; if you would like to retain your seniority and pension, and receive the retroactive pay due you, we advise you to think carefully about everything told you—then tell the A. F. L. disrupters that you are not interested in their form of phoney unionism.

Warehouse Union, Local 6, ILWU

3. *The employer's knowledge of threats to A. F. L. adherents by the C. I. O.*

On the afternoon of August 11, 1945, a C. I. O. official remonstrated with employee Albert Zulaica, subsequently discharged on September 1 under the closed-shop contract (R. I, 74; R. III, 792, 806; R. II, 654-656, *infra*, pp. 21-23), for his active advocacy of the A. F. L., warning him that such conduct by the employees would lead to their dismissal (R. I, 41; R. I, 305-310). In reply to Zulaica's assertion that "if you start doing that you will have to throw the majority out because most of them are wearing an A. F. L. button," the C. I. O. official stated, "we don't have to do that. * * * We can pick some of you out and claim that you were leaders, and that

will scare the rest of them" (R. I, 42; R. I, 309-310). On the following Monday morning, August 13, 1945, Zulaica reported the gist of this conversation to his foreman asking him to talk to the superintendent or assistant superintendent about it. That afternoon Assistant Superintendent Stanberry told Zulaica "I think all your trouble is because you are wearing those buttons. If you take them off you won't have that trouble, see. You can keep that in your heart and take your buttons off. They could never take that out of your heart if you wanted to go into another union" (R. I, 73; R. I, 310-312).

On August 30, 1945, a C. I. O. official visited Labor Relations Director Wood at his office and demanded the discharge of an estimated seventy employees, about one-fifth of the working force, upon the asserted ground that they were not members of the C. I. O. in good standing (R. I, 73-74; R. III, 728-731). Wood told him, "Go to hell * * * I [am] * * * not going to act on any such order * * * This thing has gone too far. You are getting too many people involved here. Why, the first thing you know, if this keeps on, we will be shut down * * * I want to talk to [C. I. O. Vice President] Heide about this thing before we get into this thing any deeper" (R. I, 74; R. III, 730). After a discussion with Heide, this particular request was evidently withdrawn (R. I, 74; R. III, 730).

On August 31, 1945, a C. I. O. official approached employee Kay Norris in the plant (R. I, 74; R. II, 483-484). On the previous day, this C. I. O. official

on plant premises had warned Norris to desist from campaigning on behalf of the A. F. L. (R. II, 480-482. Referring to this earlier conversation, the C. I. O. official asked Norris whether she "had changed * * * [her] mind," that he had given her "time to go home and think it over," and was she ready to "drop A. F. of L. and stick by C. I. O." (R. I, 74; R. II, 484). Upon being told that she had not changed her mind, he said, "I held out a letter for you until today * * * You are fired. You might as well get off the floor right now" (R. I, 74; R. II, 484). Norris immediately reported to Assistant Superintendent Stanberry that "that union fellow kicked me off the floor. He told me I was fired" (R. I, 74; R. II, 484, 485). Stanberry replied, "He can't do that" (R. II, 484). She then attempted to report the incident to Superintendent Altman, but on finding him out of his office reported it to another person in the office who told her to ignore the statement and return to work (R. I, 74; R. II, 485). As hereinafter more fully related (pp. 21-23, *infra*), on the next day, September 1, Norris and seventeen others were discharged under the closed-shop contract (R. I, 74; R. III, 792, 806-807, R. II, 654-656).

E. The employer, knowing the C. I. O.'s discriminatory purpose, accedes to the C. I. O.'s request to discharge the twenty-eight additional employees for their rival union activities, and refuses to reemploy the stewards and the committeemen

In addition to the discharge of the five stewards and the four committeemen, whom the employer subsequently refused to reemploy upon their request

(*infra*, p. 20), the C. I. O. secured the dismissal of twenty-eight additional employees pursuant to the closed-shop agreement (R. I, 74; R. III, 806-807, R. II, 654-656). All of the discharged employees had joined the A. F. L., worn A. F. L. buttons prominently in the plant, taken an active role in A. F. L. organizational activities, and participated in the two and a half days' work stoppage (R. II, 656-657, 506-507). All of them, with two exceptions,¹⁰ attended the meetings of July 30, 31, and August 2, 1945, and concurred in the actions taken at these meetings (R. II, 506). Their discharge, and the refusal to reemploy the stewards and the committeemen, occurred under the following circumstances:

1. The refusal to reemploy the stewards and the committeemen on August 17

On August 17, 1945, the five stewards and the four committeemen reported to work, but their request for reinstatement was denied (R. I, 73; R. I, 267-268, 289-290, R. II, 341-342, 380-381, 427, R. III, 679-680, 699-700). Labor Relations Director Wood stated that "I fell back on our legal advice" and represented to the discharged employees that under the closed-shop contract the employer was under an absolute duty to abide by the C. I. O.'s wishes (R. I, 73; R. III, 727-728). They were told by Wood that "You will have to remain out until the issue has been determined between you and the C. I. O." (R. I, 73; R. III, 728).

¹⁰ The complaint was dismissed insofar as it related to the third exception, Rose Gilbert (Schneider) (R. I, 74, 21).

2. The discharge of six employees on August 31

On the morning of August 31, 1945, the C. I. O. requested and obtained the discharge of six employees pursuant to the closed-shop agreement (R. I, 46; R. III, 806-807, R. II, 654-656). The discharges were effected in conjunction with a wholesale inspection of the employees' union dues books.¹¹ This inspection was conducted by C. I. O. officials in the vicinity of the entrance to the plant during the time when the employees were reporting to work on the morning shift (R. I, 46; R. III, 681-682, 709-716). Superintendent Altman and Assistant Superintendent Carter were present to observe the event (R. III, 681-682, 710-711). Assistant Superintendent Carter saw the C. I. O. officials hand envelopes to some of the employees, and heard them tell these employees that they could not report to work (R. III, 715-716). One employee who received a suspension notice was told, "Here is a letter for you, and you are fired. You cannot work here anymore. * * * You go to your A. F. of L. friends to help you now" (R. II, 516). Another suspended employee who received a notice was told, "take it back to your union, see if they can put you back to work, you are so crazy about them," (R. II, 564).

3. The discharge of eighteen employees on September 1

On September 1, 1945, the C. I. O. requested and obtained the discharge of eighteen more employees

¹¹ It was stipulated at the hearing that the C. I. O. did not request the discharge of any of the stewards, the committeemen, or the twenty-eight additional employees because of delinquency in the payment of union dues to the C. I. O. (R. II, 518).

pursuant to the closed-shop contract (R. I, 74, 46-47; R. III, 806-807, R. II, 654-656). On that day, the C. I. O. delivered a letter to the employer stating that these eighteen employees had been suspended discharge (R. I, 46-47; R. III, 792, R. I, 315, 684 R. from membership in the C. I. O. and requesting their II, 534. After a conference among the employer's officials, it was decided to call the designated employees into Vice President Railey's office to inform them that their employment was terminated (R. I, 47; R. III, 732-734, R. I, 313-316, R. II, 534-535, 567-568, 572-573, 620-621). The eighteen were called in and Labor Relations Director Wood reiterated to the assembled employees the management's position that it was under an absolute duty under its closed-shop contract to discharge them upon demand of the C. I. O. (R. I, 47; R. II, 735). A turbulent session ensued, during which employee Norris, whose discharge was requested, expressed her conviction that the employees were dismissed because "we wore A. F. of L. buttons and we distributed literature," to which Wood replied, "I guess it is so, that could be it" (R. II, 488). She further testified that Wood stated, "We talked too much, that if we had kept our mouths shut we wouldn't have got into this mess" (R. II, 488-489). Another employee testified that Wood said, "If you had kept this quiet about the AFL this wouldn't have happened to you" (R. I, 316). A third employee testified that Wood said, "If we [the discharged employees] didn't wear the AFL buttons and didn't talk too much, why, we wouldn't get in this trouble in the first place") R. II, 577). One of the assembled em-

employees complained, "I don't see why we can't change from from one union to another" (R. II, 492).

4. The discharge of four employees on September 5, 7, and 11

Several days later, four additional employees were dismissed pursuant to the closed-shop contract: employee Franklin Richmond was discharged on September 5, employees Manuel Alegre and John Perucca on September 7, and employee Edward Navarro on September 11 (R. I, 50 and n. 20; R. III, 806-807, R. II, 654-656).

About September 1, 1945, employee Fraklin Richmond, while wearing an A. F. L. button on his work clothes, was approached in the plant by a C. I. O. official who demanded to see his union book (R. I, 51; R. II, 630-631). Richmond walked over to his supervisor and asked whether "this goon had any right to come in here and demand to see my book merely because I have got a button on." His supervisor replied, "Well, he can ask to see your book, is all." Upon receiving the union book, the C. I. O. official noted its number. Richmond stated, "Now I suppose I will get one of your letters?" He was told, "You will!" And he did. (R. I, 51-52; R. II, 631-632.) Several days thereafter Superintendent Altman informed Richmond that he was required to discharge him because he had been named in a C. I. O. notice of suspension (R. II, 632-635). Richmond told Altman "that for every one of us that were laid off like that, for wearing those buttons, he was going to have some kind of charge placed against him" (R. II, 634).

Edward Navarro, together with three or four other machinists employed at the plant, were members of a C. I. O. union, the East Bay Union of Machinists, Local 1304, and because of their membership in the Machinist's Union all of them were permitted to work at the plant without obtaining membership in the C. I. O. local at the plant (R. I, 52; R. II, 641-642, 645-646). About September 4, 1945, Labor Relations Director Wood told Navarro that it would be necessary for him to transfer to the C. I. O. local at the plant (R. II, 642). He applied for a transfer but the C. I. O. local in the plant refused to grant it because he "was wearing an A. F. of L. button in the plant" (R. II, 642). The employer thereupon discharged him (R. I, 50 and n. 20; R. III, 806-807). The other machinists, however, were permitted to continue to work without obtaining membership in the C. I. O. local at the plant (R. II, 646).¹²

F. The C. I. O.'s subsequent trial of the discharged employees

Subsequent to their discharge, the five stewards, the four committeemen, and the twenty-eight additional employees were tried before C. I. O. tribunals. The transcripts of the proceedings before the C. I. O. tribunals and the decisions of the C. I. O. trial committees were received in evidence, not to establish the truth of the matter asserted therein for which they were incompetent hearsay, but for the limited

¹² There is no difference in principle between the refusal to qualify an employee for membership in a union because of his protected activities on behalf of a rival union and the withdrawal from an employee of his good standing in a union because of his protected activities on behalf of a rival union.

purpose of establishing that proceedings were held and that decisions were rendered (R. III, 769-771, 778-779). On October 3, 1945, the C. I. O. tried the five stewards and the four committeemen *in absentia*, and on October 10, 1945, a decision of the trial committee was issued recommending their expulsion from the C. I. O. (R. I, 52-53; R. III, 856-866, 877-922). About mid-November 1945, the C. I. O. informed Labor Relations Director Wood of this action (R. 54; R. III, 741, 762). On December 17, 1945, the twenty-eight additional employees, with the exception of Edward Navarro, were tried by a C. I. O. tribunal (R. I, 52; R. III, 923-987). Some of these employees protested what they believed to be the irregularity of the proceeding, and forthwith withdrew from further participation in it (R. III, 924, 930-935). The remaining employees participated in the proceeding, and during its course entered a so-called "guilty" plea admitting that they engaged in the two and a half days' work stoppage (R. II, 506-507, R. III, 969-976). On December 24, 1945, a decision of the trial committee was issued recommending that the employees who withdrew from the proceeding be expelled and that the employees who pleaded "guilty" be placed on probationary status (R. I, 53-54; R. III, 867-876). About January 1, 1946, the C. I. O. informed Labor Relations Director Wood of this action (R. I, 54; R. III, 742, 762).¹³

¹³ Notwithstanding the unparticularized stress which the employer places on these trials (Emp. Br., pp. 5, 15-16, 37, 53-55), it is clear that, since the trials occurred subsequent to the discharge of the employees, they have no relevance to the question of the employer's knowledge, at the time of the discharge, of the

II. The Board's conclusions of law

On the basis of the foregoing facts, the Board determined that "It is clear from the record, and we find, that the [employer] *knew* of the C. I. O.'s reason for demanding the discharges" (R. I, 76), namely, that the C. I. O. was "acting in reprisal against the complainants because of their anti-C. I. O. activity" (R. I, 79). The employer "knew, when it discharged and refused to reinstate the complainants, that the C. I. O. demanded such action because of the complainants' exercise of the right guaranteed employees in the Act to bargain collectively through representatives 'of their own choosing' " (R. I, 76). The Board concluded that the employer "thereby violated Section 8 (1) and (3) of the Act, for the reasons stated in the *Rutland Court* case" (R. I, 76).

In *Matter of Rutland Court Owners*,¹⁴ as in *Matter of Portland Lumber Mills*,¹⁵ which the Board also cites in support of its conclusion (R. I, 76, n. 6), in which the Board's order was enforced by this Court, the Board enunciated the principle that an employer

C. I. O.'s discriminatory purpose in requesting the discharges pursuant to the closed-shop agreement. The employer also stresses the "guilty" plea of some of the employees (Emp. Br., pp. 37, 54-55), but an examination of the trial transcript (R. III, 969-976) indicates that the employees did no more than admit that they engaged in the work stoppage, a fact which was never denied and which was true of most of the 313 employees. Their plea was in the nature of a demurrer to the complaint; they were not acting as penitents throwing themselves on the mercy of the tribunal.

¹⁴ 44 N. L. R. B. 587; 46 N. L. R. B. 1040.

¹⁵ 64 N. L. R. B. 159, enforced, *sub nom.*, *Local No. 2880 v. N. L. R. B.*, 158 F. 2d 365 (C. C. A. 9), cert. granted, 331 U. S. 798, dismissed on motion of petitioner, 332 U. S. 845.

cannot properly discharge employees pursuant to the closed-shop provisions of a contract when, to his knowledge, the discharge is requested by the union which is a party to the contract for the purpose of eliminating employees who have sought to change bargaining representatives at a period when it is appropriate for the employees to seek a redetermination of representatives. By this principle the Board has sought to prevent a closed-shop agreement from being converted into a device to accomplish the perennial suppression of the employees' will in the matter of choice of representatives. In the *Rutland Court* case the Board, by adopting this principle, attempted to work out an accommodation between the sometimes conflicting interest of the free choice of representatives by employees, on the one hand, and of union security and stability of the bargaining relationship, on the other.

III. The Board's order

The Board's order requires the employer to cease and desist from encouraging or discouraging membership in the A. F. of L., the C. I. O., or any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire, tenure, or other terms of employment (R. I, 80). Affirmatively, the Board's order requires the employer to offer reinstatement with back pay to the

thirty-seven employees, and to post an appropriate notice (R. I, 81-82.)¹⁶

SUMMARY OF ARGUMENT

I. The proviso to Section 8 (3) of the National Labor Relations Act does not require or permit an employer to comply with the closed-shop provisions of a contract when, to his knowledge, discharges pursuant to the contract are sought by the contracting union as a penalty for rival union activities carried on during a period when it is appropriate for the employees to seek a redetermination of representatives. This view represents the most reasonable reconciliation between the general guarantees of the Act, which permit employees to choose and change representatives, and the limitations imposed by the proviso, which permit discipline of employees in the interest of union security and stability of the bargaining relationship.

An employer's answerability for his wrongdoing in discriminating against employees by knowingly discharging them for rival union activity carried on at an appropriate period is not affected by the Board's lack of power to reach the contracting union's independent wrongdoing in requesting the discharges for such protected activity by employees. The Act, prior to its amendment, contemplated affording protection to employees engaged in rival union activity, and the amendments to the Act, in retaining employer re-

¹⁶ That part of the Board's order (R. I, 83) which sets aside the election is not before the Court for review at the present time. *N. L. R. B. v. Falk Corporation*, 308 U. S. 453. Contrary to intimations in the employer's brief (pp. 8, 11, 24), the Board's order does not set aside the closed-shop agreement.

sponsibility for wrongful discharges pursuant to a union security agreement, confirm the propriety of the Board's construction.

II. There is substantial evidence to support the Board's finding that the employer knew of the C. I. O.'s discriminatory purpose when, acceding to the C. I. O.'s request, it discharged the stewards and the committeemen, refused to reemploy them upon request, and discharged the twenty-eight additional employees. The employer's disregard of its knowledge of the C. I. O.'s discriminatory purpose, in reliance upon a mistaken view of the law, does not exculpate it from the consequences of its unlawful conduct. Nor, assuming the truth of the assertion, is it material that, to the employer's knowledge, there were other grounds for the contracting union's discharge request in addition to its discriminatory reliance upon rival union activities.

The employer's knowledge of the contracting union's discriminatory purpose may be inferred from the evidence of the information as to which the employer was apprised in the same manner in which notice in other fields is traditionally proved. In refusing to credit the employer's denial of knowledge, because of circumstances which make the truth of the disclaimer improbable, the Board does not place the employer in the role of a judge of the union's reasons for the discharge but merely exercises the traditional function of any trier of fact. Nor does the Board place upon the employer an implicit burden to seek out information as to the contracting union's purpose; it holds only that the employer may

not act in disregard of the plain import of facts of which it is apprised.

III. The rival union activities of the A. F. L. adherents occurred during a period when it was appropriate for the employees to seek a redetermination of representatives. The closed-shop agreement for an indefinite term between the C. I. O. and the employer, in existence for more than four years, no longer provided the C. I. O. immunity from challenge, because at that stage, under the Board's well-settled rules, the need of affording the employees an opportunity to oust or reaffirm their bargaining representative prevailed over the need for affording a period of quiet enjoyment to an agreement arrived at through collective bargaining.

IV. California local law substantially subscribes to the interpretation of the obligations of a closed-shop agreement as not requiring or permitting the discriminatory discharge of employees for rival union activity carried on at an appropriate time. Moreover, assuming California local law commands conduct inconsistent with that required by the National Labor Relations Act, local law must yield to paramount federal law where the two cannot stand together.

V. In affording protection to employees wrongfully discharged pursuant to a closed-shop contract, the Act does not offend the due-process requirements of the Fifth Amendment. In the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife.

ARGUMENT

I

The closed-shop proviso to Section 8 (3) of the National Labor Relations Act does not protect the employer in discharges of employees for rival union activities occurring at a time when employees may appropriately change bargaining representatives

The disposition of this case is governed by the principle enunciated by the Board in *Matter of Rutland Court Owners*, 44 N. L. R. B. 587; 46 N. L. R. B. 1040. By that principle, familiarly known as the *Rutland Court* doctrine, the Board adopts the view that the proviso to Section 8 (3) of the Act does not require or permit an employer to comply with the closed-shop provisions of a contract when, to his knowledge, enforcement of the contract is being sought as a penalty for rival union activities, where such rival union activities are carried on during a period when it is appropriate for the employees to seek a redetermination of representatives. This view represents the Board's considered judgment as to how the conflict between the general guarantees of the Act, which permit employees to choose and change representatives, and the limitations imposed by the proviso, which permits discipline of employees in the interest of union security and stability of the bargaining relationship, may most reasonably be reconciled so that the legitimate scope of each may be preserved without nullifying the other. The resolution of the antinomy in these terms requires rejection of the absolute view that any discharge pursuant to a closed-shop contract is justified without question.

The Board's refusal to accept an interpretation of the proviso which would convert it into an instrument for suppressing the democratic aspirations for orderly change has received unqualified approval by this Court in *Local No. 2880 v. N. L. R. B.*, 158 F. 2d 365 (C. C. A. 9).¹⁷ The Circuit Court of Appeals for the Second Circuit has likewise expressed its unqualified approval of the Board's *Rutland Court* doctrine in *N. L. R. B. v. American White Cross Laboratories*, 160 F. 2d 75 (C. C. A. 2).¹⁸ The Board's rationale is required by the salutary principle enunciated by the Supreme Court in *Wallace Corporation v. N. L. R. B.*, 323 U. S. 248. It has received explicit confirmation by Congress in the amendments recently made in the National Labor Relations Act (Sections 8 (a) (3) (A) and (B), 8 (b) (2), and 10 (c) of the Act, as amended).¹⁹ As this Court declared in the *Local 2880* case, *supra*, 158 F. 2d, at 368, 369:

The Board's construction of the proviso of Subsection 8 (3) with relation to Section 7 con-

¹⁷ Certiorari granted, 331 U. S. 798, certiorari dismissed on motion of petitioner, 332 U. S. 845. The case is noted in 56 Yale L. J. 1048 (1947); 15 U. of Chi. L. Rev. 232 (1947); and 33 Va. L. Rev. 521 (1947).

¹⁸ See also, *Colonie Fibre Company, Inc., v. N. L. R. B.*, 163 F. 2d 65 (C. C. A. 2). *Contra*, *Lewis Meier & Co. v. N. L. R. B.*, 21 L. R. R. M. 2093 (C. C. A. 7, November 3, 1947), "on the authority of *Aluminum Company of America v. National Labor Relations Board* (1946), 159 F. 2d 523 [C. C. A. 7]."

¹⁹ Inasmuch as Section 102 of the Labor Management Relations Act, precludes a retroactive application of its terms to make unlawful that which was, prior to its enactment, not an unfair labor practice, it is necessary to determine whether the conduct herein complained of was violative of the National Labor Relations Act prior to its amendment.

ferring on * * * all employees the right to "bargain collectively through representatives of their own choosing," as not warranting a discharge for activities at an election for such choice is so obviously rational that we well could be required to accept it under the rule that upon "questions of law the experienced judgment of the Board is entitled to great weight." *Medo Corporation v. National Labor Relations Board*, 321 U. S. 678, 681. * * * we are of the opinion that it is the only interpretation to be given the proviso * * * The Board's interpretation, in addition to confirming the democratic process in bargaining agency elections, prevents the use of the proviso for the perpetuation of a particular union's control of the employees once it enters into a closed-shop contract with their employer.

A. The employer's challenge to the soundness of this Court's approval of the *Rutland Court* doctrine in the *Local 2880* case

The employer devotes much of its argument to an effort to bring into question the soundness of this Court's approval in the *Local 2880* case (158 F. 2d 365) of the rationale expressed by the Board in *Matter of Rutland Court Owners*, 44 N. L. R. B. 587; 46 N. L. R. B. 1040. In seeking to cast doubt upon the legal soundness of the Board's conclusion that the employer committed an unfair labor practice by discharging the A. F. L. adherents with knowledge that their suspension from membership in the C. I. O. was occasioned by their activities on behalf of a rival union during a period when it was appropriate to seek a redetermination of representatives, the em-

ployer repeats in substance the same contentions fully and unsuccessfully urged by the employer and the contracting union in the *Local 2880* case. We do not propose to burden the Court with reargument of the propriety of the Board's conclusion which this Court upon full consideration described as "the only interpretation to be given the proviso of Subsection 8 (3) for closed shop contracts" (*Local 2880* case, 158 F. 2d, at 368). A few observations will suffice to disclose the fallacy upon which the employer's argument is based.

The employer's argument is predicated upon the mistaken premise that because the Board was unable, prior to the amendments to the Act, to reach the contracting union's discriminatory conduct in requesting the discharge of rival union adherents under a closed-shop contract, the Board was equally powerless to reach the employer's discriminatory conduct in acceding to the contracting union's discharge demands notwithstanding the employer's knowledge of the union's discriminatory purpose. The contention fails to perceive and distinguish between the contracting union's wrongful act in requesting the discharge of rival union adherents, on the one hand, and the employer's own wrongful act in acceding to the discharge demands, on the other. The controlling factor is the employer's answerability for its own misconduct in discriminating against employees. The employer's responsibility is not minimized or extin-

guished because of lack of power to reach the contracting union's independent wrongdoing.

Nor is it sound to contend, as the employer does (Emp. Br., pp. 66-67), that the Act prior to its amendment did not contemplate the problems arising from rival unionism because the division in the American labor movement between the American Federation of Labor and the Congress of Industrial Organizations did not occur until after the adoption of the Act. The Supreme Court in *A. F. L. v. N. L. R. B.*, 308 U. S. 401, 411, n. 4, exposed the fallacy of this reasoning when it observed: "*Congress apparently recognized that representation proceedings under § 9 (c) might involve rival unions. The House Committee said: 'Section 9 (c) makes provision for elections to be conducted by the Board or its agents or agencies to ascertain the representatives of employees. The question will ordinarily arise as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case when only one such organized group is pressing for recognition, and its claim of representation is challenged.' H. Rep. No. 1147, Committee on Labor, 74th Cong., 1st Sess., p. 22.*" [Emphasis supplied.]

The propriety of the Board's conclusion is confirmed by the retention of employer answerability for the wrongful discharge of employees under a union security agreement in Section 8 (a) (3) (A) and (B) of the Act, as amended. Indeed, Section 8 (a) (3) (C) of the final version of the Senate bill which

became the Act specifically provided that: “* * * no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * (c) if he has reasonable grounds for believing that membership was denied or terminated because of activity designed to secure a determination pursuant to section 9 (c) (1) (A), at a time when a question concerning representation may appropriately be raised.”²⁰ Because Section 8 (a) (3) (A) and (B) as finally adopted authorized an employer to discharge employees under a union security agreement only (1) for failure to acquire union membership open to employees upon nondiscriminatory terms and (2) for nonpayment of union dues and initiation fees, it was unnecessary to retain the Senate bill’s specific codification of the interpretation of the proviso to Section 8 (3) of the Act which this Court approved in the *Local 2880* case.²¹ The significant fact is that employer responsibility for wrongful discharges under a union security agreement was never questioned at any time by Congress.

B. The employer’s contention that it is placed in the role of a judge of the union’s activities

The employer contends that the Board’s decision places the employer in the role of a judge (Emp. Br., pp. 10–11, 17–19, 54, 99, 118–120). This same at-

²⁰ 1 Legislative History of the Labor Management Relations Act, 1947 (Gov’t Print. Off., 1948), p. 238. For legislative comment see S. Rep. No. 105, 80th Cong., 1st Sess., pp. 21–22; 93 Cong. Record 1825.

²¹ *Local No. 2880 v. N. L. R. B.*, 158 F. 2d 365, 369 (C. C. A. 9), certiorari granted, 331 U. S. 798, dismissed on motion of petitioner, 332 U. S. 845.

tempt to substitute metaphor for analysis was rejected by this Court in the *Local 2880* case when Local 2880 in opposing the Board's position urged that the employer was required to "exercise a quasi-judicial process."²² The contention evidently stems from the employer's misunderstanding of the effect of the Board's finding of knowledge. Upon the basis of evidence adduced at the hearing, the Board found, despite the employer's denial, that it knew of the C. I. O.'s discriminatory purpose. In so finding, the Board no more makes a judge of the employer than does a jury make a judge of a holder of a negotiable instrument when the jury returns a special verdict that the holder *knew*, at the time he received the instrument, despite his denial, that there was an infirmity in it.²³ "Notice is a fact, the existence of which is to be established by evidence in the same manner as the existence of any other fact is established; and actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstances from which a jury would be warranted in inferring notice."²⁴ As this Court has explained in an analogous situation, denial of knowledge, like the denial of any operative fact, simply renders its proof

²² Reply Brief of *Local 2880*, p. 2; Main Brief of *Local 2880*, p. 57.

²³ See 4 Williston, Contracts, § 1157 (Rev. Ed. 1936).

²⁴ In re *Leterman Becker & Co., Inc.*, 260 Fed. 543, 547 (C. C. A. 2), cert. denied, *sub nom. Coleman & Co. v. Towas Co.*, 250 U. S. 668. Substantial evidence is that quantum of proof which is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *N. L. R. B. v. Columbian Enameling and Stamping Co., Inc.*, 306 U. S. 292, 300.

difficult "because in the teeth of a denial the proof of motive must depend upon acts and circumstances which can never be conclusive and when motive is attributed to an artificial person it involves probing the intent of all the officers concerned."²⁵ Where, as here, knowledge is a prerequisite for charging a person with liability for conduct, the Board's refusal to credit the denial of knowledge, because of circumstances which make the truth of the disclaimer improbable, does not transform the unbelieving witness into a judge. It represents rather an unimpeachable exercise of a traditional function of any trier of fact.

Nor does the Board's decision, as the employer appears correlatively to contend, place upon the employer an implicit burden to seek out information. An employer is not required before complying with a discharge demand under a closed-shop agreement to conduct an investigation, to delve into the union's books and policies, or to police the union's conduct of its internal affairs.²⁶ But the disregard of the plain import of the facts of which the employer is apprised, or as the Board put it, the failure to make a "*bona fide* effort to evaluate all the evidence before it" (R. I, 79), can hardly serve to relieve the employer of its responsibility under the Act to desist from dis-

²⁵ *N. L. R. B. v. Pacific Greyhound Line, Inc.*, 91 F. 2d 458, 459 (C. C. A. 9), modified on other grounds, 303 U. S. 272.

²⁶ Contentions to that effect were made to and implicitly rejected by the Supreme Court in *Wallace Corp. v. N. L. R. B.*, 323 U. S. 248 (Employer's Br., pp. 52-54); were made to and implicitly rejected by the Circuit Court of Appeals of the Second Circuit in *N. L. R. B. v. American White Cross Laboratories, Inc.*, 160 F. 2d 75 (C. C. A. 2) (Employer's Br., pp. 3-5); were made to and implicitly rejected by this Court in the *Local 2880* case (Employer's Br., pp. 6, 19-20).

criminatory practices. To sanction an employer's adoption of a "see no evil, hear no evil, speak no evil" attitude would be to stultify a salutary principle designed to protect the employees' right to choose and change representatives by imposing upon it an unworkable standard of employer knowledge.²⁷ Surely, it is old law that a person "has no right to shut his eyes or ears to the inlet of information," and then claim in good faith that he is "without notice."²⁸

II

The Board's finding that the employer knew of the C. I. O.'s discriminatory purpose when it acceded to the C. I. O.'s request to discharge, and when it refused to reinstate, the thirty-seven named employees is supported by substantial evidence

Under the *Rutland Court* doctrine an employer is responsible for the wrongful discharge of employees

²⁷ It may be noted that Section 8 (a) (3) (B) of the Act, as amended, provides that under a union-shop contract "no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." (Emphasis supplied.) In referring to this provision, the Senate Report on the bill which became the Act, as amended, stated, "The tests provided by the amendment are based upon facts readily ascertainable and do not require the employer knowledge under the internal affairs of the union." S. Rep. No. 105, 80th Cong., 1st Sess., p. 20. This standard of employer knowledge under the amended Act appears to be less exacting than that which the Board required in this case in the interpretation of the proviso to Section 8 (3) of the Act prior to its amendment. See pp. 42-43, *infra*.

²⁸ *Simmons Creek Coal Company v. Doran*, 142 U. S. 417, 437, quoting from Virginia Court of Appeals in *Burwell's Admr's v. Fauber*, 21 Gratt. 446, 463.

pursuant to a closed-shop agreement only when the employer is shown to have knowledge that the incumbent union disqualified the employees from good standing and demanded their discharge for activities on behalf of a rival union.²⁹ In the *Local 2880* case, this Court anticipated that “Employers well may be perplexed by border-line cases of fact as to whether their employees’ dismissals from a closed-shop union are for such electioneering for a rival union or for some of many other union reasons warranting their dismissal * * *” (158 F. 2d, at 369). The crux of this case is whether or not the employer *knew* when it acceded to the C. I. O.’s demands that the C. I. O. requested the discharge of the thirty-seven named employees because of their rival union activity.

The complexity or simplicity of this fact determination does not of course change the duty of the Board and the courts in relation to it. This relationship has been aptly stated by this Court in *N. L. R. B. v. Reeves Rubber Co.*, 153 F. 2d 340, 342 (C. C. A. 9): “It would serve no purpose to collate the unbroken line of expressions by the Supreme Court of the United States and every one of the United States Circuit Courts of Appeals, including this Circuit, that the Labor Board tries the facts and the reviewing court goes into facts only to find whether or not, as a matter of law, there is sub-

²⁹ The Board has developed a standard of employer knowledge by case to case adjudication. Requisite knowledge has been deemed lacking as an appropriate basis for employer liability in *Matter of Diamond T. Motor Co.*, 64 N. L. R. B. 1225, and *Matter of Spicer Manufacturing Corp.*, 70 N. L. R. B. 41. For recent cases where it has been deemed sufficient, see *Matter of E. L. Bruce Co.*, 73 N. L. R. B. 992, and *matter of Durasteel Co.*, 73 N. L. R. B. 941.

stance to the evidence upon which the Board has made its findings.”³⁰ As in the *Reeves* case, so here, the record wholly justifies the conclusion that “there is quantity enough of relevant and competent evidence, if believed, to support the Board’s findings. The Board’s findings are conclusive to the effect that it did believe such evidence. Unless the evidence is so improbable upon its face as to the negative belief or so inconsistent as to destroy its credence, no error of law can be decreed by this reviewing court. The evidence given in the case upon which the Board based its findings cannot be characterized as either improbable beyond belief, or inconsistent to the point of destroying its credence” (153 F. 2d, at 342).³¹

³⁰ As is apparently conceded by the employer (*Emp. Br.*, p. 92), the amendments to the Act, in changing the language of Section 10 (e) from, “The findings of the Board as to the facts, if supported by evidence, shall be conclusive,” to, “The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive,” make no material change in the applicable standard of judicial review. *N. L. R. B. v. Austin Co.*, 165 F. 2d 592, 595 (C. C. A. 7); *Cf. N. L. R. B. v. Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 663 (C. C. A. 2); *N. L. R. B. v. Caroline Mills, Inc.*, 167 F. 2d 212, 213 (C. C. A. 5).

³¹ The employer, quoting from *A. E. Staley Mfg. Co. v. N. L. R. B.*, 117 F. 2d 868, 878 (C. C. A. 7), contends that “while the report of the examiner is not binding on the Board,” where, as here, the Board “reaches a conclusion opposed to that of the examiner, * * * the report of the latter has a bearing on the question of substantial support and materially detracts therefrom” (*Emp. Br.*, p. 92). However, a trial examiner’s report, in whatever posture, is recommendatory only, and can neither enhance nor detract from the conclusiveness of the Board’s findings of fact. *N. L. R. B. v. Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 830–831, 834 (C. C. A. 9); *N. L. R. B. v. Laister-Kauffman Aircraft Corp.*, 144 F. 2d 9, 16 (C. C. A. 8), *N. L. R. B. v. Blatt*, 143 F. 2d 268, 272, and n. 11 (C. C. A. 3).

A. The evidence showing knowledge

It is undisputable that the C. I. O.'s purpose in securing the discharge of the stewards and the committeemen, in precluding their reemployment upon application, and in securing the discharge of the twenty-eight additional employees, was to stifle the movement to displace it as the bargaining representative. The relevant inquiry is whether, in acceding to the C. I. O.'s demands, the employer was aware of the C. I. O.'s purpose. The employer's knowledge of reports given directly to it by employees threatened with discharge by the C. I. O. for their advocacy of the A. F. L., its knowledge of the open and widespread retaliatory campaign conducted by the C. I. O., and its knowledge of other circumstances demonstrating the C. I. O.'s discriminatory purpose could not fail to apprise the employer of the C. I. O.'s aim. In concluding that the employer "*knew* of the C. I. O.'s reason for demanding the discharges," the Board summarized the pertinent facts as follows (R. I, 76-78):

Thus, several employees reported to management representatives that the C. I. O. was threatening them with discharge under the closed-shop contract for rival union activity; and the C. I. O.'s campaign along this line, both orally and by written leaflets, was open and widespread. Moreover, the [employer's] knowledge is further shown by its refusal to accede to the C. I. O.'s request for the discharge of what it apparently deemed to be too large and obvious a number of anti-C. I. O. employees. It is true that the [employer] was not in possession of all the facts prior to the

first and second groups of discharges. Before the discharge of the committeemen at the termination of the strike on August 3, 1945, however, the [employer] learned of the C. I. O.'s plan to use its closed-shop contract to remove its opponents, for when C. I. O. Vice President Heide discovered the anti-C. I. O. activity of the committeemen, he baldly told two management representatives, Vice President Railey and Superintendent Altman, that the committeemen were thereupon being suspended. And before the discharge of the stewards the [employer] must have learned of their anti-C. I. O. activity, for it is unreasonable to suppose that it would have agreed to the request made by one of them to shut down operations in order to enable working employees to attend a meeting the stewards planned to hold without ascertaining the reason for the meeting. Moreover, the [employer], when it refused the reinstatement application of these two groups of discharged employees on August 17, 1945, was clearly apprised of the nature of the dismissals by the formal charges of discrimination which the A. F. of L. had filed with the Board. Finally, Labor Relations Director Wood admitted at the hearing, without making any differentiation among the various groups of discharges and refusals to reinstate, that he thought one of the reasons for the C. I. O.'s action was the complainants' anti-C. I. O. activity.

Consideration of the interrelated events preceding the discharges and the denials of reemployment conclusively supports the Board's conclusion.

The movement to oust the C. I. O. as the bargaining representative came into being after a six-month period of steadily growing employee unrest and dissatisfaction with the C. I. O. Apart from the employer's general awareness of the state of employee opinion in the plant (*supra*, p. 16, n. 9), the plant stewards frequently reported their discontent with the C. I. O. officials to the employer. Only four days before the execution of the extension of the closed-shop agreement on July 24, a steward warned Vice President Railey of impending labor troubles at the plant. It was against this background of known employee disquiet that Superintendent Altman, upon seeing the notice of the first anti-C. I. O. meeting to be held on July 30, reported it to Labor Relations Director Wood when asked by him "if anything unusual had happened." It was against this background, too, that Luchsinger, a steward, and Olsen obtained Superintendent Altman's agreement to shut down the plant for two hours in order to afford the night-shift employees an opportunity to attend the meeting. That so important an interruption in production, apparently unprecedented, would be authorized to facilitate an employees' meeting without managerial ascertainment of its purpose is, to say the least, highly unlikely. The relationship between this prospective meeting, designed to lay the groundwork for displacement of the C. I. O. as bargaining agent, and the prompt request by the C. I. O. for the discharge of the five stewards who were its moving force, is patent.

Immediately following the suspension and discharge of the five stewards for their part in planning the anti-C. I. O. meeting, a C. I. O. leaflet was widely distributed throughout the plant warning the employees against attendance at this "illegal meeting * * * called by certain employees now under suspension * * * at the risk of losing membership and employment." Vice President Railey acknowledged that the plant was "in a state of turmoil." Notwithstanding the C. I. O.'s warning, most of the employees attended the meeting and voted to form a new labor organization as well as to seek the reinstatement of the stewards who were leading the insurgent movement. Promptly the next morning, the committeemen requested Vice President Railey to reinstate the stewards. They informed him that a telegram had been dispatched, which Railey received during the conference, advising him of the employees' desire to replace the C. I. O. as bargaining representative. Vice President Railey conceded that "it became quite apparent," during the interchange between the committeemen and the C. I. O. officials at this meeting, "that there was a schism developing in the ranks of the C. I. O." Indeed, on this very occasion, striking its second blow against the leadership of the insurgent movement, the C. I. O. notified the employer of the suspension of the committeemen.

Concurrently, with the suspension of the committeemen, another C. I. O. leaflet was widely distributed throughout the plant warning the employees that alignment with "Sherman-Marshall-Lundeberg &

Co.," who were the stewards and committeemen, would bring summary dismissal under the closed-shop contract. That same afternoon, a second anti-C. I. O. meeting was held, again attended by most of the employees, at which Vice President Railey, who had been invited to speak, sought to persuade the employees that the closed-shop agreement gave him no alternative but to discharge the stewards. Railey's attendance and speech at this meeting, at which the temper and object of the employees was patent, negates belief that he was unaware of the C. I. O.'s purpose. Railey's explanation failed to satisfy the employees, and, protesting the high-handed dispatch of their leadership, they refused to return to work for two and one-half days, a work stoppage which afforded the employer dramatic realization of the depth of the employees' desire to change bargaining representatives.

On August 3, after affiliation with the A. F. of L. had been completed at a third anti-C. I. O. meeting, all the employees returned to work with the exception of the stewards, who had been previously discharged, and the committeemen, who had been told the day before by the employer that their employment was terminated because of their suspension by the C. I. O. The collocation of events between July 30 and August 2, during which the intensity of the rift between the C. I. O. and the employees was dramatically manifest, ending with the definitive termination of the employment of the stewards and committeemen on August 3, could scarcely have left the employer with doubt as to

the C. I. O.'s discriminatory purpose when it complied with the C. I. O.'s discharge demands.

Whatever doubt the employer may have entertained concerning the C. I. O.'s reason for the suspension of the stewards and the committeemen was dissipated by events occurring prior to August 17 when the stewards and committeemen applied for and were denied reemployment. In the interim between August 3 and August 17, as the employer knew, the A. F. L. invoked the Board's election machinery as well as its processes for the redress of unfair labor practices. The A. F. L.'s petition for investigation and certification of representatives was filed on August 3, an informal conference attended by the employer, the A. F. L., and the C. I. O. pertaining to it was held at the Board's regional office on August 8, and notice of formal hearing was received by the employer on August 17. Electioneering by both unions was flourishing, and the tenor of the C. I. O.'s retaliatory campaign was plain. Moreover, the first of the reports from threatened employees had been received by the employer's officials on August 13, and employee Zulaica, in complaining of the attempt by the C. I. O. to intimidate him, was advised by Assistant Superintendent Stanberry to the effect: "I think all your trouble is because you are wearing those buttons. If you take them off, you won't have that trouble, see. You can keep that in your heart and take your buttons off. They could never take that out of your heart if you wanted to go into another union" (*supra*, p. 18). Finally, Labor Relations Director Wood ad-

mitted at the hearing, without making any differentiation among the various groups of discharges and refusals to reinstate, that he thought one of the reasons for the C. I. O.'s action was the anti-C. I. O. activity of the A. F. L. adherents (R. I, 78; R. III, 737). Accordingly, the suspension of the stewards and committeemen by the C. I. O. because of their leadership of the movement to oust the C. I. O. as bargaining representative was known to the employer. Its refusal to reemploy them on August 17, knowing that their suspension by the C. I. O. was actuated by their protected activity on behalf of the A. F. L., is unambiguously within the rule "that discrimination in hiring is twin to discrimination in firing" and the Board is empowered "to restore to a man employment which was wrongfully denied him." *Phelps-Dodge Corporation v. N. L. R. B.*, 313 U. S. 177, 187-188; *N. L. R. B. v. Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 833-834 (C. C. A. 9). The Board's conclusion that the stewards and committeemen were refused reinstatement by the employer with knowledge that they were denied employment because of their protected activities on behalf of a rival union is plainly proper (R. I, 78, 79).

. It was against this fully developed pattern of retaliation that the employer, in addition to the termination of the employment of the stewards and the committeemen as leaders of the insurgent movement, acceded to the C. I. O.'s request to discharge the twenty-eight additional employees. Having eliminated the leadership, the C. I. O. sought to stifle the employees' rival union activity by striking a blow

against the main body of the insurgent movement. The C. I. O.'s principal thrust fell on August 31 and September 1 when twenty-four of the twenty-eight employees were discharged. The remaining four discharges on September 5, 7, and 11 were part of the same retaliatory pattern.

This pattern left little to the imagination. Its design was manifest in the hectic organizational period between July 30 and August 3 during which most of the 313 employees struck in protest against the C. I. O.'s discriminatory action (*supra*, pp. 10, 12-13); it was manifest in the C. I. O.'s retaliatory campaign epitomized in its widely circulated August 22 leaflet, "Any Peet's employee reported as trying to bolt the C. I. O. and join the A. F. L. or wearing an AFL button, will be taken off the job" (*supra*, pp. 16-17); it was manifest in C. I. O. threats to individual A. F. L. adherents which were reported to the employer (*supra*, pp. 17-19). Moreover, the C. I. O.'s extravagant request on August 30 that seventy employees be discharged, upon the omnibus, but transparent, ground that they were not in "good standing," was of necessity a demonstration to the employer of the C. I. O.'s discriminatory purpose since it was explicable on no other basis (*supra*, p. 18). Indeed during the turbulent session on September 1, when the discharge of eighteen employees was effectuated, the C. I. O. was directly accused of retaliatory tactics by the A. F. L. adherents, and Labor Relations Director Wood in effect confessed managerial knowledge of the C. I. O.'s discriminatory purpose when

he said, "If you had kept this quiet about the AFL this wouldn't have happened to you" (*supra*, p. 22). In the light of these circumstances, to conclude that the employer did not know the C. I. O.'s punitive purpose would be to ascribe to the employer's officials a degree of credulity in the conduct of ordinary affairs to which experienced businessmen are not customarily addicted.

The employer's conduct in acceding to the C. I. O.'s discharge demands, inexplicable upon the basis of lack of knowledge of the C. I. O.'s discriminatory purpose, is wholly consistent with the different hypothesis which it urges in its brief to exculpate itself (Emp. Br., pp. 14, 46, 47-48, 116-117). Its course of action was predicated upon the rigid assumption that its closed-shop agreement imposed upon it an inflexible obligation to abide absolutely by the C. I. O.'s demands. The employer's representation to discharged employees between July 30 and September 11 was a consistent plea that under the closed-shop agreement it had no alternative but to dismiss them upon demand. (R. III, 726-727; *supra*, pp. 8, 11, 12, 20, 22.) This erroneous legal theory held out to the employer the possibility that it could avoid its duty under the Act by counter-poising to it an exaggerated duty under its closed-shop agreement, and thus render irrelevant its knowledge that the C. I. O.'s request for the discharge of the employees was based on the C. I. O.'s desire to punish the employees for engaging in activities to replace it as the bargaining representative. The employer's reliance upon this mis-

taken view of the law explains its indifference to its knowledge of the C. I. O.'s discriminatory purpose, but it does not serve to relieve the employer from answerability for its acts. It is elementary that a mistake of law does not shield the wrongdoer from the consequence of its unlawful conduct.³² Accordingly, the Board's conclusion that the employer "discharged and refused to reinstate the complainants in violation of Section 8 (1) and (3) of the Act" is fully warranted (R. I, 79).

B. The employer's contentions

An analysis of the reasons suggested by the employer to discount the Board's conclusion that the employer knew of the C. I. O.'s discriminatory purpose serves to confirm the propriety of the Board's finding.

1. The employer's asserted reliance upon the telegram of July 31 as an act of withdrawal from the C. I. O.

The employer contends that the telegram it received from the insurgent employees on July 31, during the conference at which the reinstatement of the stewards was urged, notifying it "of action taken by more than 200 employees of Colgate Palmolive Peet Co. all being former members ILWU 1-6 and being more than 50 percent of total employees have withdrawn and severed relations with ILWU-6 as collective bargaining agent" (*supra*, p. 10), consti-

³² Restatement, Restitution, § 7, Comment a: "Whether or not considered to be a fact, a rule of law is unlike other facts in that a person who does an act which otherwise would be unlawful is ordinarily not excused from liability because of a mistaken belief, however reasonable, that his act is rightful."

tuted a withdrawal of membership from the C. I. O. by the A. F. L. adherents and was accordingly a valid ground for discharge under the closed-shop agreement (Emp. Br., pp. 4, 14, 38-39, 40, 103-104). As this Court noted in a comparable situation, "the Board felt, and we think justifiably, that this claim of motivation is a palpable afterthought. [The telegram was] confessedly not assigned as a ground for [the] discharge[s] at the time [they] occurred, nor [was it] mentioned as a motivating factor in [the employer's] answer filed in the proceeding." *Wells, Inc., v. N. L. R. B.*, 162 F. 2d 457, 459 (C. C. A. 9).

The C. I. O. at no time treated the telegram as an effective withdrawal from membership in the C. I. O., and at no time represented to the employer that its request for the discharge of the A. F. L. adherents was based on the telegram as an act of withdrawal from membership. Its formal representations contained in its letters to the employer requested the discharge of named employees because they had been "*suspended* from membership" pending a trial before a C. I. O. tribunal upon charges filed against them (R. III, 846-847, 784-785, 792-793). [Italics supplied.] As is apparent, the C. I. O. could not consistently maintain, and the employer cannot reasonably assert that it believed, that the employees were not members of the C. I. O., but that the C. I. O. at the same time asserted jurisdiction over them for the purposes of trial.

The telegram speaks of "more than 200 employees" and "more than 50 percent of total employees." The

disparate selection of a minority of these employees for discharge emphasizes that the telegram as an ostensible act of withdrawal from the C. I. O. played no part in the discharge demands. Moreover, the suggested construction glosses over the phrase reading "severed relations with I. L. W. U.-6 *as collective bargaining agent.*" [Italics supplied.] This is the key to the interpretation of the telegram and indicates the meaning which was ascribed to it by all, including the employer and the C. I. O. Its purport and intent, and the employer so understood it, was to express the desire of a majority of the employees to replace the C. I. O. as bargaining representative. As explained by Committeeman Sherman in his testimony: "It was not the intent of the telegram to segregate individuals as discontinuing affiliations with the C. I. O. The intent of the telegram was that we were discontinuing the bargaining agency, forming another group." (R. II, 399).

The Board correctly concluded (R. I, 78, n. 8): "As for the complainants' withdrawal from the C. I. O., which would ordinarily entitle the [employer] to discharge them in view of the closed-shop contract, it will be observed that the C. I. O. did not accept their withdrawals nor is there any evidence that the [employer] discharged them or rejected the reinstatement application of the stewards and the committeemen *for that reason.* On the contrary, the [employer's] answer and evidence show beyond dispute that the [employer] acted because of the complainants' suspension by the C. I. O. pending deter-

mination of charges of anti-C. I. O. activity, and that the attempted withdrawals played no part therein. Apparently the significance of the 'withdrawals' occurred to the [employer] for the first time in its brief to the Trial Examiner after the close of the hearing." The employer's belated effort to imbue this inartistically drawn telegram with significance which it does not possess injects into the proceedings an issue which does not exist.

2. The employer's asserted inability to distinguish between legitimate and discriminatory C. I. O. purposes

Taking for its text a statement which appears in the original charge filed in this proceeding alleging the discriminatory dismissal of the stewards and committeemen "because of their refusal to adhere to policies of Warehouse Union Local 1-6 I. L. W. U.," (R. I, 93), the employer contends that it was unable to determine whether the C. I. O.'s discharge demands were motivated by the refusal of the A. F. L. adherents to conform to C. I. O. policies or by the desire of the A. F. L. adherents to effect a change in bargaining representatives (Emp. Br., pp. 48-49, 106-107, 4, 25-27, 43, 44-46, 47, 54-55, 85-87, 93-94, 110-111, 120-123).

In considering this contention, it is necessary carefully to distinguish between the failure of employees to *conform* to valid rules of conduct required by the contracting union and the failure of employees to *agree* with the policies underlying those rules which leads them to take action to displace the contracting union. The desire of employees to change bargaining

representatives does not arise *in vacuo*. It is bot-tomed on disagreement with the incumbent concern-ing the way in which to promote and manage union policies. Those policies may relate to wage and hour issues, day-to-day administration of the collective bargaining agreement, attitudes towards racial issues, participation of unions in politics, or any of the mani-fold problems which are the concomitants of con-temporary trade unionism. The genius of democratic institutions, of which trade unions are one aspect, rests on the interchange of ideas free from re-prisal and their submission for decision to the elec-toral process. It is a meaningless contradiction in terms to grant employees the right to change repre-sentatives, but to deny them the right to disagree with the incumbent concerning the policies upon which an intelligent change must be predicated. The neces-sary concomitance of the two is obvious. "The freest of open advocacy of the divergent views of the voters," to which this Court gave eloquent expres-sion in the *Local 2880* case (158 F. 2d. at 369), re-quires the freest of open advocacy upon meaningful issues. And in effectuating these views, the taking of action by employees to displace the contracting union may not, under the guise of failure to con-form to the contracting union's rules, be made the subject of disciplinary measures.

We turn then to the record to evaluate the self-serving testimony of the employer's officials as to the information they had that the stewards, the com-mitteemen, and the twenty eight additional employees

failed to conform to C. I. O. policies. In doing so, it is necessary to guard against the easy assumption that this information in fact beclouded the indisputable C. I. O. purpose of punishing employees for daring to oppose it. In contrast to the unwillingness of the employer's officials to testify that they knew the patent fact that the C. I. O. was abusing the closed-shop contract in order to suppress opposition to it, they were ready to testify that they knew of other facts which they were ostensibly unable to identify as inseparable from the C. I. O.'s suppressive purpose. This question of sheer fact has been correctly resolved against the employer by the Board's decision.

Taking the testimony of the employer's officials at face value and in its best light, they knew (1) that at scattered intervals over a period of at least a year prior to the suspension of the stewards, there had been some disagreement between the C. I. O. officials and the stewards concerning the administration of the contract and the manner in which certain individual grievances were to be processed, and that there had been some dispute between them concerning the implementation of the C. I. O.'s political action program and its nondiscriminatory racial policy (R. II, 561, 725-726, 763-768); (2) that in protest against the discharge of the stewards, the committeemen planned a work stoppage in contravention of the war-time no-strike pledge of organized labor (R. III, 725); (3) that the twenty-eight additional employees participated in the work stoppage (R. III, 677); and (4)

that the daily press reported that the work stoppage involved in part a dispute over the C. I. O.'s non-discriminatory racial policy (R. II, 533, 562-563, R. III, 678, 702). This information did not obscure the C. I. O.'s purpose. Rather, it forcibly demonstrated its oppressive character.

Disagreement between the stewards and the C. I. O. officials extending over a year concerning union matters did not precipitate a request for discharge *until the stewards took steps to change the bargaining representative*. It was therefore not the fact of disagreement, but the fact of effective steps to implement it, which caused the suspension of the stewards. To assume that the employer's officials failed to recognize the plain import of this fact is to assume that they "lack capacity for making rational connections."³³

As to the information that the committeemen planned a work stoppage to protest the discharge of the stewards, it appears that the employer's officials did not even know, during the morning of July 31, when the committeemen were ordered discharged by the C. I. O. because of their suspension, that a work stoppage was contemplated (R. II, 409-410; R. III, 673). Consequently, upon this occasion, the employer's officials could not have acted upon the assumption that the suspension of the committeemen was caused by the planning of a then unknown work stoppage. Without doubt the employer's officials learned of the planned work stoppage shortly thereafter, but the effect of this knowledge was dramatically to em-

³³ *Thomas v. Collins*, 323 U. S. 516, 535.

phasize to them the extent of the employees' revolt against the efforts of the C. I. O. to nip in the bud their movement to change representatives by striking at the leadership. It was plainly evident that if the C. I. O. were concerned with avoiding the work stoppage *qua* work stoppage the simple expedient would be to permit the reinstatement of the stewards who had done no more than exercise their legal right to seek a change of representatives.

As to the discharge of the *twenty-eight* additional employees one month after their participation in the work stoppage in which most of the 313 employees partook, their disparate selection for discharge could not for a moment have been attributed to a belated desire by the C. I. O. to vindicate a breach of the no-strike pledge which it had itself provoked. The employer's officials could not reasonably be presumed to have attributed the discharge of the twenty-eight additional employees to the C. I. O.'s interest in avoiding interruptions to war work when the C. I. O. itself had caused the permanent removal of thirty-seven employees and had unsuccessfully attempted the removal of seventy employees. Indeed, in refusing to accede to the C. I. O.'s request on August 30 to discharge the seventy employees, the employer's Labor Relations Director, Wood, himself stated to the C. I. O. official: "This thing has gone too far. You are getting too many people involved here. Why, the first thing you know, if this keeps on, we will be shut down" (*supra*, p. 18).

Finally, the racial issue, like the wage issue, whatever its merits, is but part of the fabric of issues which

forms the substantive basis for the desire of employees to change representatives. In short, unless complete lack of ordinary understanding upon the part of the employer's officials is assumed, they recognized of necessity that the so-called legitimate reasons for the requested discharge of the A. F. L. adherents were not the factors which induced the C. I. O.'s demands, and that the work stoppage dramatically revealed the deep rift between the employees and the C. I. O. officialdom. As this Court has held, "The existence of some justifiable ground for discharge is no defense if it was not the moving cause." *Wells, Inc. v. N. L. R. B.*, 162 F. 2d 457, 460 (C. C. A. 9). The employer knew, in acceding to the C. I. O.'s discharge demands, that the "moving cause" was discriminatory.

In any event, assuming it can be said in this case that the employer was persuaded that the C. I. O. acted from both proper and improper motives in requesting the discharge of the A. F. L. adherents, the legal consequences are no different than if the employer knew, as is the fact, that the sole reason for the C. I. O.'s request was the rival unionism of the A. F. L. adherents. The necessity for this conclusion is apparent from a consideration of the practical impossibility of disentangling legitimate from illegitimate motives where both are concurrently operative in impelling a course of conduct, and determining whether one without the other would have been sufficient to induce the proscribed behavior. Unlawful motivation is nonetheless unlawful because accompanied by factors which by themselves would not fall under interdiction. It is not consonant with sound concepts of legal responsibility to leave the victims

of oppressive conduct without the statutory remedy because the wrongdoer has been sufficiently ingenious to adumbrate his illegal conduct with equivocal lawful considerations. The Second Circuit, confronted with this precise issue in the *American White Cross Laboratories* case, *supra*, succinctly concluded: "Nor is it pertinent that, to the company's knowledge, there were other grounds for the discharge request." 160 F. 2d, at 77-78. This accords with established practice.³⁴

3. *The employer's asserted confusion because the C. I. O. requested the discharge of many but not all A. F. L. adherents*

The employer contends that it was unable to ascertain the C. I. O.'s purpose because there were other employees, apart from those whose discharges were requested, who were electioneering on behalf of the A. F. L. whom it is said the C. I. O. did not molest (Emp. Br., pp. 52-53). The employer chooses to forget that it itself blocked a clean sweep by refusing to accede to the C. I. O.'s request for the discharge of seventy employees on August 30. Nor is it exacting to infer, upon the discharge of better than ten percent of the working force for A. F. L.

³⁴ *N. L. R. B. v. Remington-Rand, Inc.*, 94 F. 2d 862, 872 (C. C. A. 2), cert. denied, 304 U. S. 576; *Butler Bros. v. N. L. R. B.*, 134 F. 2d 981, 985 (C. C. A. 7), cert. denied, 320 U. S. 789; *Kansas City Power & Light Co. v. N. L. R. B.*, 111 F. 2d 340, 349 (C. C. A. 8); *Cupples Co. Mfrs. v. N. L. R. B.*, 106 F. 2d 100, 117 (C. C. A. 8); *Matter of Lone Star Gas Co.*, 52 N. L. R. B. 1058, 1060; *Matter of United Dredging Co.*, 30 N. L. R. B. 739, 766, note 24; *Matter of Dow Chemical Co.*, 13 N. L. R. B. 993, 1023, enforced, 117 F. 2d 455 (C. C. A. 6); *Matter of Consumer's Research, Inc.*, 2 N. L. R. B. 57, 73; cf. *N. L. R. B. v. Gluek Brewing Co.*, 144 F. 2d 847, 857 (C. C. A. 8).

adherence, that the employer recognized mayhem for mayhem although the victim was only partially disfigured.³⁵

III. The period during which the employees undertook their rival union activities was appropriate for a redetermination of bargaining representatives

Apart from the question of the employer's knowledge of the contracting union's discriminatory purpose, the *Rutland Court* doctrine requires that the employee's rival union activities, in order to be protected, must occur at a period during which it is appropriate to seek a redetermination of representatives. Upon this aspect of the case, there is no dispute as to the soundness of the Board's conclusion that the rival unionism of the A. F. L. adherents occurred during a protected period.

The Board found the closed-shop agreement (*supra*, p. 5) to have been validly entered into in conformity with the proviso to Section 8 (3) of the Act (R. I, 69). The Board concluded, however, that, by virtue of the indefinite term of the contract, the employees undertook to oust the C. I. O. as their bargaining representative at a period during which it was appropriate to seek a redetermination of representatives (R. I, 75, 54-55). As the Board succinctly stated, in directing the election to resolve the question of representation raised by the A. F. L. as a result of the rival union activity in this case: "Neither the

³⁵ Cf. *N. L. R. B. v. Lurury, Inc.*, 123 F. 2d 106, 108-109 (C. C. A. 2); *Triplex Screw Co. v. N. L. R. B.*, 117 F. 2d 858, 861 (C. C. A. 6); *N. L. R. B. v. Aladdin Industries, Inc.*, 125 F. 2d 377, 384 (C. C. A. 7), cert. denied, 316 U. S. 706.

original nor supplemental contracts contain a definite termination date. In view of its indefinite duration and the fact that it has been in force for at least 1 year, we find that the contract and extensions thereof, do not constitute a bar to a determination of representatives" (R. III, 802, 799-805, R. II, 552).

Underlying the Board's conclusion is the Board's well-settled rule concerning the length of time during which a union is immune from challenge by virtue of a collective bargaining agreement for an indefinite term. In determining whether a validly existing agreement between an employer and a union precludes an election for the purpose of resolving a disputed question of representation, the Board balances the interest in industrial stability, resulting from affording a period of quiet enjoyment to an agreement arrived at through collective bargaining, with the need of affording to employees reasonable intervals at which they may oust or reaffirm their bargaining representatives.³⁶ In making that equation, it is the Board's settled practice, with certain refinements irrelevant to the instant case,³⁷ not to disturb a contract of reasonable duration containing a definite termination date until the approach of the expiration of the contract term.³⁸ Where, as here, the collective bargaining agreement runs for an indefinite period, the Board's rule at the time this case was decided required that the union's immunity from

³⁶ National Labor Relations Board, Twelfth Annual Report (Gov't Print. Off. 1948), p. 9.

³⁷ *Id.*, at pp. 9-14.

³⁸ *Id.*, at p. 9.

challenge end after the contract has been in effect for one year,³⁹ and thereafter whenever a question concerning representation arises an election for the purpose of resolving it is timely.⁴⁰ When, in the instant case, the A. F. L. adherents undertook activities looking toward the displacement of the C. I. O. as their bargaining representative, their rival unionism occurred more than four years after execution of the contract (*supra*, pp. 5-6) and therefor, during a time when it was appropriate to seek a change of representatives. As this Court has held, the employer could not knowingly during such a period, at the behest of the incumbent, invoke the closed-shop agreement to place under a pall "The freest of open advocacy of the divergent views of the voters."⁴¹ Whether the employees are ultimately successful through their electioneering in effecting a change is immaterial, since the very object of a protected period is to afford employees freedom from discrimination whether in victory or defeat. Uncoerced resort to the franchise cannot depend on success in its exercise.

³⁹ Recently, "in the interest of promoting greater stability in industrial relations," the Board has extended to two years the period of immunity "accorded to long-term contracts and contracts of indefinite duration." *Matter of Puritan Ice Co.*, 74 N. L. R. B. 1311, 1313-1314; *Matter of Fitrol Corp.*, 74 N. L. R. B. 1307; Twelfth Annual Report, *supra*, at p. 10.

⁴⁰ National Labor Relations Board, Eleventh Annual Report (Gov't Print. Off. 1947), p. 14; cf. Twelfth Annual Report, *supra*, p. 10.

⁴¹ *Local No. 2880 v. N. L. R. B.*, 158 F. 2d 365, 369.

IV. The Board's construction of the closed-shop agreement is consistent with California local law, and in any event federal law is paramount to local law

The employer urges the impropriety of the Board's order upon the ground that California local law imposes upon the employer an absolute duty to abide by the terms of a closed-shop agreement to which it is a party, and that, upon failure to perform, the employer may be required specifically to perform or to answer in damages (Emp. Br., pp. 76-78). Since the Board's decision prevents performance of a closed-shop agreement where its purpose is to stifle rival unionism at an appropriate period, the argument is that the employer is subjected to the inconsistent mandates of state and federal forums. The contention was made to and implicitly rejected by this Court in the *Local 2880* case (Br. of Local 2880, pp. 24, 68).

At the outset it should be observed that the California Supreme Court takes no such inflexible view of the closed-shop agreement as is ascribed to it. It holds that a closed-shop agreement may not be utilized to cause the termination of a worker's employment for non-membership in a labor union where membership in the union is not open to him upon reasonable terms. *Marinship Corp. v. James*, 25 Cal. 2d 721, 155 Pac. 2d 329; *Williams v. International Brotherhood of Boilermakers*, 27 Cal. 2d 586, 165 Pac. 2d 903; *Bautista v. Jones*, 25 Cal. 2d 746, 155 Pac. 2d 343. In the *Williams* case, *supra*, the Court stated, "The individual worker denied the right to keep his job suffers a loss, and his right to protection against arbitrary and discriminatory exclusion should be

recognized wherever membership is a necessary prerequisite to work" (27 Cal. 2d at 591, 165 Pac. 2d at 906). In order to show that its decision was in harmony with the National Labor Relations Act, the Court cited the Board's decision in *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, the very case which established the rationale which this Court approved in the *Local 2880* case, and which is the foundation of the instant proceeding (27 Cal. 2d at 592, 165 Pac. 2d at 906). The California Supreme Court went on to say that an employer may be enjoined from enforcing its closed-shop agreement where performance would subject the employees to discriminatory treatment (27 Cal. 2d at 594, 165 Pac. 2d at 907). Accordingly, rather than lending support to the employer's contention, California local law substantially subscribes to the interpretation of the obligations imposed by a closed-shop agreement as expressed in the *Local 2880* case.

Moreover, assuming that California local law commands conduct inconsistent with that required by the National Labor Relations Act, there is little clearer than that local law must yield to federal law where the two cannot stand together. *Hamilton v. N. L. R. B.*, 160 F. 2d 465, 471 (C. C. A. 6); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767; *Hill v. Florida*, 325 U. S. 538; *N. L. R. B. v. Hearst Publications*, 322 U. S. 111, 123; *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218; *Rice v. Board of Trade*, 331 U. S. 247. In *Hill v. Florida*, 325 U. S. 538, 542, the Supreme Court ad-

verted with approval to an instance when the Board rejected an employer's defense of its refusal to bargain based on the union's failure to comply with the Florida local law requiring the licensing of a bargaining representative. There the Supreme Court stated: "Congress did not intend to subject the 'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments.' " In support of its conclusion, the Supreme Court cited its decision in *N. L. R. B. v. Hearst Publications*, 322 U. S. 111, where at p. 123, in language dispositive of the employer's contention, it had stated:

The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. *e. g.*, Sen. Rep. No. 573, 74th Cong., 1st Sess., pp. 2-4. It is an Act, therefore, in reference to which it is not only proper, but necessary for us to assume, "in the absence of a plain indication to the contrary, that Congress * * * is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U. S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.

V. The Board's decision and order do not violate the due process clause of the Fifth Amendment

The employer contends that the Board's order is in contravention of the Fifth Amendment to the Federal Constitution in that it impairs the obligations of a contract and requires the reinstatement with back pay of the discharged employees without due process of law (Emp. Br., pp. 11, 57, 84). It is late in the day to make that argument. "The Board's order does not violate the Fifth Amendment * * *. In the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife. *N. L. R. B. v. Jones & Laughlin Corp.*, 301 U. S. 1, 48. The Board's order there sustained required the reinstatement of discharged employees." *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347. See also *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 187; *N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465, 471 (C. C. A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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SEPTEMBER 1948.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a),

in the appropriate collective bargaining unit covered by such agreement when made.

* * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such

person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

The relevant provisions of the Labor Management Relations Act (61 Stat. 136, 29 U. S. C., Supp. I, sec. 141, *et seq.*), are as follows:

* * * * *

TITLE I—AMENDMENT OF NATIONAL LABOR
RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * *

“RIGHTS OF EMPLOYEES

“SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

“UNFAIR LABOR PRACTICES

“SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * *

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representa-

tive of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

“(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

“(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

“REPRESENTATIVES AND ELECTIONS

“SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a

unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

“(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

“(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

“(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an

officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

“(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

“(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

* * * * *

“PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

“[SEC. 10] (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein

such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

* * * * *

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the

enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

No. 11,514

IN THE
United States Court of Appeals
For the Ninth Circuit

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL CHEMICAL WORKERS
UNION, A.F.L., et al.,
Intervenors,

and

WAREHOUSE UNION LOCAL 6, INTER-
NATIONAL LONGSHOREMEN'S & WARE-
HOUSEMEN'S UNION (CIO),
Intervenor,

and

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

COLGATE-PALMOLIVE-PEET COMPANY,
Respondent.

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REPLY BRIEF FOR PETITIONER,
COLGATE-PALMOLIVE-PEET COMPANY.

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I.

INACCURACIES IN THE BOARD'S STATEMENT OF THE FACTS.

In this portion of our brief we call attention to inaccuracies in the Board's Statement of the Facts

which result from misstatements of the record or from reliance on only part of the record, or both.

(a) At page 6 of the Board's brief, the following appears:

“Dissatisfaction with the representation accorded them by the C.I.O. had been brewing among the employees for about six months before the extension of the closed-shop agreement.”

This statement is inaccurate because it ignores part of the record. The Board fails to state that there is nothing in the record to indicate that the Petitioner learned of this alleged dissatisfaction prior to the time that the telegrams, which are in evidence as the Board's Exhibits 5 and 6, were dispatched and received. This statement, set forth as it is without explanation, could give rise to the inference that the employer had knowledge of such dissatisfaction prior to the time above mentioned.

(b) At page 6 of the Board's brief, the following is stated:

“On July 20, 1945, four days before the execution of the extension of the collective agreement, Steward Marshall in a conversation with B. W. Railey, the employer's vice-president, asked that the five stewards be present when the extension was signed *because of impending labor troubles at the plant due to the employees' unrest.*” (Italics ours.)

The foregoing is a misstatement of the record. The record is clear that Steward Marshall did not tell Mr. Railey that the five stewards desired to be present

when the extension was signed “because of impending labor troubles at the plant due to the employees’ unrest.” This is what Mr. Marshall said:

“I asked him if the contract of the Union was to be signed that the stewards of Colgate-Palmolive-Peet be present, and he asked me why, and I said that we expected some trouble to rise at that time. And he said he would.” (R. 188-189.)

This is a far cry from saying that there were “impending labor troubles at the plant due to the employees’ unrest.”

It is evident that this is another effort on the part of the Board to bring home knowledge to the Petitioner of employee unrest prior to the time of the transmittal and receipt of the telegrams, and prior to the occurrence of the strike, notwithstanding the fact that there is nothing in the record to sustain such a contention.

(c) At page 9 of the Board’s brief, there is set forth a warning bulletin issued by the C.I.O. at the plant, and the Board fails to mention that there is no evidence that the Petitioner had knowledge of this notice or its contents. In setting forth this notice without this explanation, the Board again attempts to give the impression that the Petitioner knew, before the discharge of the four Committeemen, of the fact that the CIO had threatened those who attended the meeting with loss of membership and employment.

(d) At pages 11 and 12 of the Board’s brief, the Board gives its version of the interview between the employer’s representative, the CIO officials and the

four Committeemen, but renders it totally inaccurate by stating in connection therewith only a part of what appears in the record. The Board places emphasis on part of a sentence carefully culled from the record. The Board states:

“Vice-President Railey in his testimony agreed that ‘it became quite apparent as this conversation took place that there was a schism developing in the ranks of the CIO’.”

The record is as follows:

“Q. Well, it became apparent as this conversation took place that there was a schism developing in the ranks of the CIO, of the ILWU, did it not, at the plant?

A. It certainly was, at least between the CIO *and certain individuals*. Whether it was, what percentage * * *”. (Italics ours.)

(R. 545-546.)

The Board not only has indulged in the culling to which we have called attention but has also failed to make any mention of the actual substance of the exchange between CIO officer Lynden and Committeeman Sherman, and, for this reason, it will do no harm to restate a portion of the statement made by Mr. Lynden, as testified to by Mr. Railey:

“A. I don’t know what is the right word to use for it. As I say, they were reminded of their oath, and of course, Mr. Sherman, who was speaking for the negotiating committee, accused the Union of failure to get increases for the men and for the people working there. And Mr. Lynden for the Union did bear down to the extent that

they had taken an oath, and they had failed to observe it, and he pointed out what happened to a traitor for the United States, and they were a traitor to their Union, that they had the right to discipline their people. *In fact, he said—this was when the war was still on—he said they had many times been called upon to discipline people, keep them working.* And he said even in the shipyards they had been called upon to discipline people outside of working hours who were inclined to drive fast, or drink, or something like that, *to try to keep them working,* because the government said, ‘Unless you straighten your man out he can’t work here.’ And it was a defense of the C.I.O. by Mr. Lynden, naturally, and their policies, and resentment on the part of Mr. Sherman, who was a former Business Agent, and whether he was disappointed or what I couldn’t say, but at any rate, he was obviously not in sympathy with C.I.O.” (Italics ours.)

(R. 545.)

(e) At page 12 of the Board’s brief, mention is made of the bulletin issued by the C.I.O. warning against participation in an illegal strike. This is another example of careful culling on the part of the Board. The complete text of this bulletin is set forth at page 44 of Petitioner’s opening brief and an examination thereof reveals that it is in substance a warning againgst aligning with the “unscrupulous people who are attempting to promote strike action at this plant.” This is a case of deliberate misdescription for the purpose of creating the impression that this was solely a threat of loss of jobs.

II.

INACCURACIES IN THE BOARD'S STATEMENT OF THE
FACTS IN ITS ARGUMENT.

In its argument on the facts, at pages 47 and 48 of its brief, the Board states:

“Finally, Labor Relations Director Wood admitted at the hearing, *without making any differentiation among the various groups of discharges and refusals to reinstate*, that he thought one of the reasons for the C.I.O.’s action was the anti-C.I.O. activity of the A.F.L. adherents.” (Italics ours.)

In making this statement, the Board has failed to note that Mr. Wood, in failing to make a “differentiation” between groups of employees, properly did so because he was answering a series of questions relating to the group of eighteen who were discharged on or about September 1, 1945, and that he was in no way referring to employees discharged on prior occasions. In this connection, the attention of the Court is called to what appears in the record, pages 732-737, inclusive.

The Court will note that this alleged failure to make a differentiation between the discharges of various groups by Mr. Wood is one of the keystones to the Board’s argument that the Petitioner knew of the CIO’s alleged discriminatory intent when it discharged and refused reinstatement to the stewards and the committeemen. It is submitted, therefore, that the Board cannot rely on this portion of the record to support its argument.

(b) In attempting to change the plain meaning of the telegrams which are in evidence as the Board's Exhibits 5 and 6, the Board argues as follows:

“Moreover, the suggested construction glosses over the phrase reading ‘severed relations with I.L.W.U.-6 as *collective bargaining agent*.’ (Italics supplied.) This is the key to the interpretation of the telegram and indicates the meaning which was ascribed to it by all, including the employer and the C.I.O. Its purport and intent, and the employer so understood it, was to express the desire of a majority of the employees to replace the C.I.O. as bargaining representative. As explained by Committeeman Sherman in his testimony: ‘It was not the intent of the telegram to segregate individuals as discontinuing affiliations with the C.I.O. The intent of the telegram was that we were discontinuing the bargaining agency, forming another group.’” (Board's Brief, page 53.)

In making this argument, the Board fails to note that the Trial Examiner ruled that the Petitioner was not bound by the construction which the witness Sherman placed upon the telegrams, and that the Board affirmed this ruling. (R. 399-401; 68.)

The Petitioner not being bound by the witness's construction of the meaning and intent of the telegrams, it is clear that the Petitioner is entitled in this proceeding to have them considered in accordance with their plain and ordinary meaning. This being so, the telegrams are evidence of the fact that certain of Petitioner's employees had withdrawn from the CIO for every purpose and that the contention that

these telegrams were intended merely as a notification of dual unionism by the employees cannot stand.

(c) In attempting to nullify the effect and significance of the telegrams announcing the employees' withdrawal from the CIO, the Board argues as follows:

“The Board correctly concluded (R. I, 78, n.8): ‘As for the complainants’ withdrawal from the C.I.O., which would ordinarily entitle the [employer] to discharge them in view of the closed-shop contract, it will be observed that the C.I.O. did not accept their withdrawals nor is there any evidence that the [employer] discharged them or rejected the reinstatement application of the stewards and the committeemen for that reason. On the contrary, the [employer’s] answer and evidence show beyond dispute that the [employer] acted because of the complainants’ suspension by the C.I.O. pending determination of charges of anti-C.I.O. activity, and that the attempted withdrawals played no part therein. *Apparently the significance of the “withdrawals” occurred to the [employer] for the first time in its brief to the Trial Examiner after the close of the hearing.*’ The employer’s belated effort to imbue this inartistically drawn telegram with significance which it does not possess injects into the proceedings an issue which does not exist.” (Board’s Brief, pp. 53-54.) (Italics ours.)

The statement that the significance of the “withdrawals” occurred to the “employer” for the first time in its brief and that any argument thereon is an after-thought is a palpable misstatement of the

record which has already been called to the Board's attention. (Petitioner's Motion to Reconsider, p. 30; Document No. 16, listed in the Board's Certificate, R. 88.) The following taken from the record definitely shows that petitioner's contention with respect to the withdrawal of employees is not an after-thought:

"Mr. Hecht. Mr. Examiner, before the question is answered I would like to object to any more statements as to change of unions. It is obvious Exhibits 5 and 6 show all these people intended to change unions, and, as a matter of fact, changed unions by reason of these wires, at least, severed their relations, and whatever they said later on as to the changed unions is not material here." (R. Vol. II, p. 491.)

In addition, the record shows that at the close of the Board's case, counsel for the C.I.O. made a motion to dismiss the proceeding on the ground that the employees had "withdrawn" from the contracting Union. (R. 664.) Under such circumstances, the contention that the Petitioner's argument is an "after-thought" cannot stand.

III.

THE BOARD PERSISTS IN DISTORTING THE RECORD THROUGH INVALID INFERENCES.

In the Petitioner's opening brief, attention was called to the fact that in order to bolster its case, the Board relied on invalid inferences. (Petitioner's Brief, pp. 95-98; 105; 111-118.) The Board, although it does not dispute the validity of the legal objections

raised by Petitioner against findings based on invalid and prohibited inferences, is not daunted and repeats this performance in its brief. Thus, we quote therefrom the following statements:

1. "The Board concluded that the employer would not have authorized so important an interruption in the plant's operations without ascertaining the purpose of the meeting." (Board's Brief, p. 7.)

2. "That so important an interruption in production, apparently unprecedented, would be authorized to facilitate an employees' meeting without managerial ascertainment of its purpose is, to say the least, highly unlikely." (Board's brief, p. 44.)

3. "Because of the Board's practice promptly to inform persons of charges filed against them, the Board inferred that the employer was apprised of this charge by August 17, 1945." (Board's Brief, p. 15.)

With respect to items 1 and 2, we have already pointed out that the Board's counsel could have elicited direct testimony, had he so desired, as to whether the Petitioner was told or had ascertained the permissive anti-CIO purpose of the meeting. As to item 3, which is a new thought, it can also be pointed out that the Board cannot rely on inference because it is patent that the Board's employees in its San Francisco office were available to testify as to whether or not the Petitioner was promptly informed in accordance with Board practice as to the charges lodged against it. Under such circumstances, on the author-

ity of *Galloway v. United States* (1943), 319 U.S. 372, 87 L.Ed. 1458, the Board cannot be permitted to rely on inferences or on its "expertness" to sustain these findings.

IV.

THE BOARD MISCONCEIVES PETITIONER'S ARGUMENT CHALLENGING THE SOUNDNESS OF THIS COURT'S APPROVAL OF THE RUTLAND COURT DOCTRINE IN THE LOCAL 2880 CASE.

The Board contends that our argument challenging the soundness of the doctrine announced in *Matter of Rutland Court Owners*, 44 N.L.R.B. 587, is invalid because we have failed to distinguish between the Board's inability, under the Wagner Act, to reach the contracting union's *independent wrong-doing* and the employer's answerability under said Act, for his wrong-doing in acceding to the request for the discharge of employees because of activity on behalf of a rival union. (Board's Brief, pp. 28; 33-36.)

The key to the Board's misconception of our argument lies in the charge that a contracting union is guilty of "wrong doing" and "wrongful acts" in demanding and obtaining, under the terms of a closed-shop contract, the discharge of employees because of their activity on behalf of a rival union. Unless such alleged "wrong doing" is premised or postulated, it is a logical and practical absurdity to say that the Board can interfere with, suspend or prevent the performance of an admittedly valid contract through

orders directed solely at the employer. It must be remembered that such a contract is the property of the contracting union (*M. & M. Wood Working Co. v. N.L.R.B.* (1939), 101 Fed. (2d) 938), and that the practical effect of orders, such as the one issued in this case, is to suspend the operation of the closed shop provisions of the contract which are intended to be for the direct benefit of the contracting union. It also must be remembered that the portions of the Board's order requiring the reinstatement of the discharged employees effects a violation of this contract, because compliance therewith will result in the employment by Petitioner of persons not in good standing with the contracting union. The effect of such reinstatement would, therefore, be to deprive the CIO, unless it be guilty of "wrong-doing", of property without due process of law.

That such wrong-doing is essential to the validity of the Board's doctrine is borne out by the fact that this Court's approval thereof in *Local 2880, etc. v. N.L.R.B.* (1946), 158 Fed. (2d) 365, is premised on the following proposition:

A labor organization which so coerces an employee as to cause him to exercise the rights guaranteed by Section 7 of the Wagner Act *in terrorem of discharge* is ineligible to become or remain a party to a closed shop contract, and a discharge by the employer pursuant to a closed shop contract vitiated by the ineligibility of the coercing union, is assistance of the type defined by the Act as an unfair labor practice.

In other words, this Court has held that a closed shop contract is destroyed because of the contracting union's "wrongful" acts.

It is submitted that until the passage of the Taft-Hartley Act, it was generally held that a contracting union was not guilty of wrongful conduct in securing the discharge of employees because of activity on behalf of a rival union, and that there was nothing in the Wagner Act proscribing or outlawing such conduct. In support of the first branch of the foregoing contention, we refer the Court to Sections 810 and 811 of the "Restatement of the Law of Torts". In support of the second branch of this contention, we submit that the Board admits that there was nothing in the Wagner Act which made illegal or prohibited such activity on the part of the contracting union. In *Matter of Lewis Meier & Company* (1947), 73 N.L.R.B. 520, at 523, the Board said:

"Moreover, it appears from the legislative history of the Act that Congress rejected the concept that labor organizations should be made amenable to Section 8 thereof. The respective committee reports to both the Senate and the House of Representatives mention proposals for prohibiting labor organizations, as well as employers, from engaging in activities defined in Section 8 as unfair labor practices. *Indeed, attention was explicitly called to the possibility of arbitrary use of the closed shop by labor organizations, and specific proposals were made for its avoidance. Congress, however, refused to include any of these proposals in the Act as written.*" (Italics ours.)

Since it is plain that the contracting union has not been guilty of any wrongful conduct in exercising its rights under a closed shop contract, it is submitted that it is impossible to contend that such a contract is unenforceable or that the operation thereof may be suspended by Board order. Therefore, it must be granted that the employer is legally unable to refuse compliance with such a contract and that it is unjust to exact penalties from it because it has been compelled to perform a legal obligation.

V.

THE BOARD'S CONTENTIONS THAT ITS DECISION DOES NOT REQUIRE THE PETITIONER TO ASSUME THE ROLE OF JUDGE AND INQUISITOR ARE CONTRADICTED BY THE CONTENTS OF ITS BRIEF AND BY ITS DECISIONS.

The Board's contention that its decision does not place the employer in the role of judge is untenable. The Petitioner in this case is called upon to "‘distinguish,’ ‘interpret,’ ‘explain,’ ‘reconcile,’ often with a finesse that would have delighted the angelic and subtle Doctors of the Middle Ages or the rabbinical pundits of Sora and Pumbeditha."¹ In proof of this, we offer for the Court's consideration the contentions made by the Board, at pages 51-61 of its brief, and in particular to the Board's tortured argument with respect to the language contained in the telegrams, which are in evidence as Board's Exhibits 5 and 6,

¹ "The Good Judge of Chateau-Thierry", 10 Cal. Law Rev. 300, at 305.

and to the language of the original charge filed with the Board.

On the subject whether an employer is required to act as an inquisitor or investigator, the Board contends:

“Nor does the Board’s decision, as the employer appears correlatively to contend, place upon the employer an implicit burden to seek out information. An employer is not required before complying with a discharge demand under a closed-shop agreement to conduct an investigation, to delve into the union’s books and policies, or to police the union’s conduct of its internal affairs.” (Board’s Brief, p. 38.)

The answer to this is that the Board expressly places on the employer, in situations similar to that involved in this case, the burden of seeking out information and requires him to delve into a union’s conduct of its internal affairs. In proof of this, we quote from two decisions of the Board.

“For, although Halderman was thus admittedly aware that the discontent among his co-workers was due, in part at least, to Clark’s rival union membership, and although, according to Nichols’ testimony, Halderman asked for ‘a little more proof of why the boys were refusing to work with (Clark) before he * * * discharged’ him, *it failed to make such a reasonable investigation of the facts as the circumstances of the case required.* * * * *Significantly there is no evidence that the respondent pursued the inquiry any further or that Halderman inquired among employ-*

ces of the disgruntled crew.” (Italics ours.) *Matter of Pillsbury Mills, Inc.* (August, 1947), 74 N.L.R.B. 1113, at 1116.

“We find, therefore, that the respondent knew at the time of the discharge that these men would not have been expelled from the Union had it not been for this activity. *Certainly, it made no effort to determine from the CIO the extent, if any, to which dual unionism was considered in determining the penalty.*” (Italics ours.) *Matter of Durasteel Company* (May, 1947), 73 N.L.R.B. 941, at 945.

In connection with the foregoing, it should be borne in mind that the Board requires not “perplexity” or “incertitude” but “knowledge” with respect to the contracting union’s motivation before applying the principle of the *Rutland Court* case.²

On the other hand, the Labor Management Act, 1947, requires a less strict standard to be adhered to in cases where a discharge is sought because of non-membership in a labor organization. The proviso of Section 8(3) of the Labor Management Act, 1947, recites that no employer shall justify any discrimination against an employee “if he *has reasonable grounds* for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring

²*Matter of Spicer Manufacturing Corporation* (1946), 17 N.L.R.B. 41;

Matter of Diamond T Motor Car Company (1945), 64 N.L.R.B. 1225;

Board’s brief in *Local 2880, etc. v. N.L.R.B.*, pp. 22, 24.

or retaining membership." There is a vast distinction between "knowledge" and "reasonable belief". "Knowledge" connotes a more certain and definite mental attitude than "reasonable belief".³

Accordingly, the standard set up by Congress in the Labor Management Act, 1947, does not require an employer to assume the role of a judge or an inquisitor, as does the standard set up by the Board and for this reason, it is respectfully submitted that Congress, in amending the National Labor Relations Act, has expressly determined that an employer shall not be subjected to the burdensome tasks and responsibilities which the Board has sought to impose in cases of this type.

VI.

THE BOARD'S CONSTRUCTION OF A CLOSED SHOP AGREEMENT IS NOT CONSISTENT WITH CALIFORNIA LOCAL LAW AND THE BOARD'S INTERPRETATION CANNOT BE PERMITTED TO OVERRIDE LOCAL LAW.

The Board argues that under California law, a request for the discharge of employees, who would destroy the contracting union through activity on behalf of a rival union, is illegal and discriminatory conduct. (Board's Brief, pp. 64-65.) Such an argument is untenable and does not find support in any of the California cases cited by the Board.

The Board also argues that assuming California law permits conduct inconsistent with its interpreta-

³*State v. Miller* (1937), 193 S.E. 388, 212 N.C. 361.

tion of the Wagner Act, the local law must yield to the Board's legislation. (Board's Brief, pp. 65-66.) This argument is a reiteration of the Board's contention with respect to the exclusive nature of the Wagner Act and its right to administer it without regard to other laws, whether Federal or State, and its asserted right to disregard the consequences of its decisions. This insistence upon exclusiveness and independence in the administration of the Wagner Act has involved the Board in severe collisions with the Courts⁴, and in at least two important cases, the Board's attempt to override all other laws has been effectively frustrated. We have in mind the cases of *N.L.R.B. v. Fansteel Metallurgical Corporation* (1939), 306 U. S. 240, 83 L. Ed. 627, and *N.L.R.B. v. Southern Steamship Co.* (1942), 316 U. S. 31, 86 L. Ed. 1246. In the last cited case, the Supreme Court rejected the Board's view that sailors who had mutinied, notwithstanding the illegality of their actions, could be directed to be reinstated with back pay upon a finding that their employer had discriminated against them in violation of the Wagner Act. In rejecting the Board's decision, the Supreme Court said:

"It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act *so single-mindedly* that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional pur-

⁴"A Labor Policy for America", Teller (Baker, Voorhis & Co., 1945), p. 38.

pose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation *without excessive emphasis upon its immediate task.*" (Italics ours.) (*Southern Steamship Co. v. National Labor Relations Board*, 310 U. S. 46, 86 L. Ed. 1259.)

The foregoing admonition given to the Board by the Supreme Court suffices to establish that the Board is not empowered to deprive a union which has not committed any wrongful or illegal act of its property rights in violation of the Fifth Amendment to the Federal Constitution.

VII.

LEGAL PROPOSITIONS ADVANCED IN PETITIONER'S BRIEF WHICH THE BOARD HAS CONCEDED BY ITS FAILURE TO COMBAT THEM.

Several legal propositions set forth in Petitioner's brief which establish the illegality of the Board's decision and order have not been rebutted by the Board and, in some instances, have not even been mentioned and are, we submit for this reason, conceded to be correct by the Board.

These legal propositions are the following:

(a) It is no defense to the performance of a contract that the obligor knows that the agreement or its performance might aid the obligee to violate the law (Petitioner's Brief, pp. 78-80).

(b) An act lawful in itself is not converted by a malicious or bad motive into an unlawful act (Petitioner's Opening Brief, pp. 87-91).

(c) The Board's conclusionary finding that Petitioner made no bona fide effort to evaluate the evidence is based on an invalid presumption, disregards a valid presumption and is contrary to the record (Petitioner's Opening Brief, pp. 111-120).

Dated, San Francisco, California,
September 27, 1948.

Respectfully submitted,

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No. 11,514

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For the Ninth Circuit

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IN THE
United States Court of Appeals
For the Ninth Circuit

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL CHEMICAL WORKERS
UNION, A.F.L., et al.,

Intervenors,

and

WAREHOUSE UNION LOCAL 6, INTER-
NATIONAL LONGSHOREMEN'S & WARE-
HOUSEMEN'S UNION (CIO),

Intervenor,

and

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

COLGATE-PALMOLIVE-PEET COMPANY,
Respondent.

PETITION FOR A REHEARING OF
COLGATE-PALMOLIVE-PEET COMPANY.

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

This Honorable Court, by its decision and opinion filed in the above entitled cause on January 13, 1949, has, for the second time, affirmed the doctrine announced and applied by the National Labor Relations Board in the *Matter of Rutland Court Owners*, 44 N.L.R.B. 587, 46 N.L.R.B. 1040. The Petitioner knows, therefore, that it would be impertinent and presumptuous to argue again the question of the validity of this doctrine and to petition for a rehearing on any contention directed to this phase of the matter.

The petitioner is also aware of the fact that on this branch of the case, the decisions of this Court are in clear conflict with the decisions of the Court of Appeals, for the Seventh Circuit,¹ and, further, that the Supreme Court agreed to review the first decision of this Court on this question.² In addition, the Petitioner realizes that a decision by the Supreme Court on this question of law would be determinative of all other issues involved in this case. All of these factors would seem clearly to indicate that the Petitioner should not further importune this Court for the

¹*Aluminum Co. v. N.L.R.B.* (1946), 159 Fed.(2d) 523; *Lewis Meier & Co. v. N.L.R.B.* (1947), 21 L.R.R.M. 2093, 13 Labor Cases, 72, 249.

²*Local 2880 v. N.L.R.B.* (1946), 158 Fed.(2d) 365; Certiorari granted 331 U. S. 798, certiorari dismissed on motion of petitioner, 332 U.S. 845.

relief it believes is due it, but that it should take its grievance to our highest Court. However, the Petitioner is also aware of the fact that the review of its case by the Supreme Court is a matter of grace, not of right, and, further, that this Court could, without changing its position on the issue of law, clear it of the charge of bad faith which the Board has unjustly fastened upon it, and deliver it from an order which can be supported only on this unjustifiable charge. These last mentioned factors, considered in the light of what appears in the Court's opinion herein, has led the Petitioner to conclude that the filing by it of a petition for a rehearing would not be just a reargument of the issues determined by this opinion, but would, on the contrary, fulfil one of the primary purposes of all such petitions which is to call attention to material matters of law or fact inadvertently overlooked by the Court, as shown by its opinion.³

Accordingly, Petitioner respectfully calls attention to, and submits as reason for the granting of its petition for a rehearing the following material matters of law and of fact inadvertently overlooked by the Court:

³*Millslagle v. Olson* (1942, C.C.A. 10), 128 Fed. (2d) 1015.

I.

THE LABOR MANAGEMENT ACT, 1947, AND THE ADMINISTRATIVE PROCEDURE ACT REQUIRE THAT THE FINDINGS OF THE BOARD BE SUSTAINED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE, AND THAT THE REVIEWING COURT SHALL CONSIDER THE WHOLE RECORD IN DETERMINING WHETHER THE FINDINGS OF THE BOARD ARE SUPPORTED BY SUBSTANTIAL EVIDENCE. THE COURT DID NOT, IN THE INSTANT CASE, CONSIDER THE WHOLE RECORD.

The recital of facts contained in the opinion of the Court is notable for its brevity, and omits all the facts which render the evidence proffered by the Board in support of its findings unsubstantial. We conclude from this, that the Court has searched the record solely to determine whether there is some evidence to sustain the findings, and not for the purpose of determining whether on the *whole* record the Board's evidence remains substantial. This method of review, although it has been sanctioned sometimes in the past, does not conform to the existing law. This Court in so reviewing the record in this cause has thereby overlooked material matters of fact. Our reasons in support of this statement are hereinafter set forth.

The Court states in its opinion that "the evidence abundantly supports" the following findings of the Board:

(a) That the CIO sought to use the closed shop contract for the purpose of punishing the insurgents; and

(b) That the Petitioner acceded to discharge-demands of the CIO, notwithstanding it knew

that the Union had suspended the men in reprisal for their activities in favor of the rival Union.

The opinion thus discloses that the Court has found the findings of the Board to be supported by evidence solely because it has accepted only that part of the record cited by the Board and has entirely, although inadvertently, disregarded other convincing evidence contained therein which was cited by the Petitioner. We are of the opinion that it has always been the rule that findings of administrative agencies which are arrived at by accepting part of the evidence and totally disregarding other convincing evidence are not legally sufficient and not acceptable to the reviewing Courts.

“It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10(e) of the Act, 49 Stat. 453, 29 U.S.C.A. paragraph 160(e), which provides that ‘the findings of the Board as to the facts, if supported by evidence, shall be conclusive.’ But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.”

National Labor Relations Board v. Union Pacific Stages (1938, C.C.A. 9), 99 F.(2d) 153, at 177.

It may be argued that the principle announced in the above quotation has been eroded by such decisions

as *N.L.R.B. v. Waterman Steamship Corporation*, 309 U.S. 206, 84 L. Ed. 704, and *N.L.R.B. v. Bradford Dyeing Corporation*, 310 U.S. 318, 84 L. Ed. 1226, and that the latitude of reviewing Courts in so far as administrative agencies are concerned, has been limited by the rules announced in these cases. However, even if that be conceded, the Administrative Procedure Act (5 U.S.C.A., Secs. 1001-1011), which went into effect on September 11, 1946, and the Labor Management Act, 1947 (29 U.S.C.A., Secs. 141-197), which went into effect on June 23, 1947, have removed the limitations imposed upon reviewing Courts by the above mentioned cases.

Section 10(e) of the Administrative Procedure Act provides, in part, as follows:

“(the reviewing court shall) * * * hold unlawful and set aside agency * * * findings, and conclusions found to be * * * (5) unsupported by substantial evidence * * *. In making the foregoing determinations the court shall review the *whole* record or such portions thereof as may be cited by any party, * * *.” (Italics supplied.)

5 U.S.C.A., Sec. 1009 (e).

The Labor Management Act, 1947, provides in part as follows:

“The findings of the Board with respect to questions of fact *if* supported by substantial evidence on the record considered as a *whole* shall be conclusive.” (Italics supplied.)

It is most clear that these two statutes require that before the findings of an administrative agency be

accepted as conclusive, they must be sustained by the record as a whole and that the reviewing Court, in determining whether such findings are supported by substantial evidence, must consider the record as a whole and not only such parts of the record which sustain the contentions of the Board or some other administrative agency.

That this Court failed to comply with the requirements of the statute is made apparent when it is noted that the Court when it declared that the findings of the Court were abundantly supported by the evidence, failed to state or take notice of material facts which rendered less than substantial the evidence proffered by the Board. For example, on the issue of the illegality of the motivation of the CIO and of the Petitioner's knowledge thereof, the Court entirely overlooked the following material facts, among others:

1. The resignation of all the discharged employees from the CIO.
2. The participation of all the discharged employees in a strike not authorized by the CIO.
3. The undisputed right of the CIO to discipline the persons who participated in these actions.
4. The admission by nine of the discharged employees that they were discharged because of their refusal to adhere to the established policies of the CIO. (R. 70; 71-72; 202-203; 258; 274; 296; 365-367; 404-405; 420-421; 506-507; 92-93.)

No one disputes the materiality and the relevance of these facts and yet the Court, without even men-

tioning them, dismisses their effect with the sweeping statement that, "the evidence abundantly supports" the findings of the Board.

The history and express language of these two statutes demonstrate that it was the intent of their draftsmen and of Congress to put an end to the practice by reviewing Courts of disposing of administrative adjudications by just stating that substantial evidence supports the findings of the agency without setting forth material facts which must render such evidence unsubstantial. No clearer demonstration of the fact that Congress intended to change the formulae to be applied by Courts in reviewing administrative adjudications is to be found than in the following discussion of the Federal Administrative Procedure Act by Professor Dickinson:⁴

"The revelant language is that the reviewing court, in making its determinations in the enumerated situations where it is their duty to set aside an administrative finding, 'shall review the whole record or such portions thereof as may be cited by any party.' This language is to be read especially in connection with that part of the previous sentence which lays upon the court the duty of setting aside 'agency action, findings and conclusions * * * unsupported by substantial evidence'. These two parts of the statute when read together sum up into substantially the same result as that contained in the bill of the Acheson Committee minority which required the reviewing court to consider 'findings, inferences or conclusions of fact unsupported, upon the whole record, by substan-

⁴Professor of Law, University of Pennsylvania Law School.

tial evidence.' The intention and meaning of this language was in turn explained by the quotation from Dean Stason's testimony at the Senate hearings, set forth at an earlier point in this paper. It there clearly appears that the purpose and intention of the third sentence of paragraph (e) of the judicial review section of the Administrative Procedure Act is to eliminate from judicial review of fact determinations not merely the scintilla rule but also that interpretation of the substantive evidence formula which would permit the reviewing court to examine *only one side of the evidence*. The purpose of the new provision, while not requiring the reviewing court to weigh evidence and substitute its own judgment for that of the administrative agency, is to require it at least to look at the evidence on both sides and see whether the evidence in support of the administrative conclusion can fairly be regarded as substantial in the face of the evidence on the other side. This purpose was made explicit in the House Committee report on the present bill, where the following language occurs:

'The requirement of review upon "the whole record" means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.'

Identical language occurs in the report of the Senate Committee.

Aside from these and similar unmistakable expressions of legislative intent, it seems entirely clear that language which differs as widely as that contained in the last sentence of paragraph (e) from the hitherto accepted formulae for fact

review would not have been used, and that there would have been no reason or excuse for using it in the statute, if it was the intention of Congress by this paragraph to make no change in existing law but merely to restate it. The existing formulae confine themselves to the requirement either that the finding of the administrative agency shall not be 'unsupported by evidence' or 'shall be supported by substantial evidence'

The Administrative Procedure Act goes further. *It does not content itself with a mere re-statement of the 'substantial evidence' rule; it adds a novel requirement when it says that the reviewing court in determining whether or not a finding is supported by substantial evidence 'shall review the whole record or such portions thereof as may be cited by any party'.*" (Italics supplied.)

Federal Administrative Procedure Act; Proceedings of an Institute conducted by the New York University School of Law, pp. 586-589.

The Congressional history of the Labor Management Act, 1947, also clearly indicates that it was the intent of Congress to conform the judicial review sections of this statute to the corresponding sections of the Administrative Procedure Act.

"Sections 10 (e) and 10 (f), relating to enforcement and review in the various circuit courts of appeal and in the Supreme Court, contain no changes in existing law, except with regard to the weight given to findings of the Board by the reviewing tribunal. Under the present act, the

Board's findings of fact, if supported by evidence, are deemed to be conclusive. This has been construed by the Supreme Court as meaning 'substantial evidence'. Nevertheless, there has been some dissatisfaction with what has been viewed as too great a tendency on the part of the courts not to disturb Board findings, even though they may be based on questions of mixed law and fact * * *. Although considerable sentiment was expressed in committee for a rule which requires the courts to support Board orders, unless contrary to the weight of the evidence, it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clarify any ambiguity in that statute, however, the committee inserted the words 'questions of fact as supported by substantial evidence *on the record considered as a whole.* * * *'.⁵

Senate Report 105 on Labor Management Act, 1947, 80th Congress, pp. 26, 27.

⁵The following colloquy between Mr. Benjamin, distinguished writer on administrative law, and Arthur E. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, and former Dean of the New York School of Law, and one of the members of the Acheson Committee which drafted the Federal Administrative Procedure Act, emphasizes the very important change wrought in the judicial review of agency action by the Federal Administrative Procedure Act:

"Mr. Benjamin: The point that I wanted to make was one of New York local pride. I think, on this question of the whole record, that the New York Court of Appeals is entitled to priority, because it brought out the whole record substantial evidence doctrine—I believe, back in 1940, in the case of Stork Restaurant against Boland, about 282 N. Y. The opinion there is quite explicit but the argument in the Court of Appeals was even more explicit and I thought it would be worth recounting very briefly, because it illustrates so well the scope of review about which Mr. Dickinson was talking.

That was an appeal by the State Labor Board to the Court of Appeals and Ralph Seward, Counsel for the Board, argued

We submit, in the light of the express language and the history of these statutes, that the Court erred, and that a hearing should be granted for the purpose of giving consideration to material facts overlooked by the Court in appraising the *substantiality of the evidence supporting the findings of the Board*.

first. After he had been arguing 20 minutes or so, Judge Lehman said, 'Mr. Seward, you have recounted to us evidence in support of the Board's finding that appears to be substantial. I suggest that you now permit the respondent to argue, because the question for this court is whether, against the background of the respondent's evidence, your evidence remains substantial.'

That was the scope Mr. Dickinson was advocating and it is my local pride that the Court of Appeals actually handed that down as doctrine six or seven years ago.

Dean Vandervilt: I must confess as a member of the minority that I do not think any of the minority were aware of that decision. But I will say that when we were trying to draft what we called a concurring report (everyone in the law likes to find a plaintiff and a defendant so we promptly became a majority in the minority), we groped around for some phrase or group of words which would put an end to this mumbo-jumbo business of having a court say, 'we find substantial evidence', but without saying anything of what they found on the other side. After four or five days of phrase seeking, we finally hit upon that one and it is certainly very comforting to know that we have high precedent. I have a notion that we are going to need all the controlling and persuasive argument that can be found to prevent development of the other meaning''.

Discussion, during an institute on Federal Administrative Procedure conducted by the New York University School of Law; Federal Administrative Procedure Act and the Administrative Agencies, pp. 591-592.

II.

THE COURT WAS REQUIRED TO DECIDE ALL THE RELEVANT QUESTIONS OF LAW PRESENTED, BUT DID NOT DO SO, AND IN THIS THE COURT ERRED.

The Federal Administrative Procedure Act discussed in the foregoing section of this brief provides in part as follows:

“So far as necessary to decision and where presented the reviewing court shall decide *all relevant questions of law*, interpret constitutional and statutory provisions and *determine the meaning or applicability of the terms of any agency action.*” (Italics supplied.)

5 *USCA*, Sec. 1009 (e).

In our brief we presented for the Court's consideration many relevant questions of law, which assumed the validity of the Rutland Court Doctrine, but which cast great doubt on the validity of the Board's action in applying this doctrine to the facts of the instant case. These questions were not determined by the Court and the Court failed to pass on the validity of the Board's action, and in this the Court erred.

“It is submitted that such a position on the part of the courts will henceforth be hard to square with the specific language of the first sentence of paragraph (e) of Section 10 of the Administrative Procedure Act, if that sentence is given the effect which an objective reading of its words seems to require. The reviewing court is there not merely given the power, but the word ‘shall’ is placed under an obligation, not only to ‘interpret constitutional and statutory provisions’ but to ‘decide all relevant questions of law’; and then

follow the additional words which impose on the reviewing court itself the further duty of determining 'the meaning or applicability of the terms of any agency action'. The explicitness of this additional language just quoted, coupled with its reference to 'the meaning of the terms' of agency action, would seem henceforth to require the court in a review proceeding to look for itself at even those technical questions, whether they are regarded as law or fact, which are frequently involved in the 'terms of agency action', and which the courts in recent years have tended to treat as more or less immune from judicial consideration."

Federal Administrative Procedure Act, and the Administrative Agencies, Proceedings of an institute conducted by the New York University School of Law, pp. 584-585.

The questions of law on which the Court failed to pass are set forth hereinafter:

- (a) Whether the CIO's lawful act of suspending the employees who participated in the strike was converted by its alleged malicious or bad motives into an unlawful act?

In our opening brief, pages 87 to 91, we argued that the CIO's lawful act of suspending and demanding the discharge of the employees who had participated in the strike was not converted into an unlawful act by its alleged malicious motivation, and that under such circumstances, the Board had no right to apply herein the Rutland Court doctrine. The Court, however, entirely overlooked this material matter of fact and law.

That this was a relevant question of law, which, in addition, involved a determination of the correctness of the Board's action is hardly open to question. In passing on this very important issue, the Trial Examiner said:

“Assuming, for the moment, that the respondent believed that both factors prompted the C.I.O.'s request, the undersigned knows of no feasible method by which the respondent could determine which factor was the motivating one in the C.I.O.'s decision to invoke the closed shop provision of the contract.” (R. 59.)

And in the footnote appended to the foregoing quotation he says:

“Or is the presence of an illegitimate motive alongside a legitimate one, sufficient, as the Board has frequently ruled where discharges absent a closed shop are concerned, to render a discharge violative of the Act? The undersigned does not believe that it is.” (R. 59.)

Commenting further on this point the Trial Examiner says:

“That the contracting Union might properly discipline members for participating in a strike called in violation of union policy, by suspending or expelling them, seems to the undersigned hardly open to question. A labor organization, no less than any other organization, cannot be denied the authority to compel compliance with the decisions of its membership. ‘Good standing’ in an organization implies something more than the mere payment of dues.” (R. 63.)

The Court, like the Board, has entirely ignored and has failed to decide this very relevant question of law and fact involving the CIO's right to discipline and cause the discharge of employees who participated in an illegal strike, notwithstanding its alleged malicious motivation, and in this the Court has failed to comply with the requirements of the Administrative Procedure Act.

- (b) Whether the Board's findings that petitioner had "knowledge" of its employees' anti-CIO activity when it discharged the first two groups of employees, are based on invalid and prohibited inferences and should be disregarded?

On pages 93 to 104, inclusive, of our brief, we argued that the Board's findings on the question of Petitioner's knowledge were invalid, and in addition, that, on the authority of *Galloway v. United States*, 319 U. S. 373, 87 L. Ed. 1458, the Board was not permitted to rely on inferences when direct evidence as to the fact involved was available. The Board failed to make any answer to this argument, and the Court ignored and failed to decide this important and relevant question of law.

- (c) Whether the finding of the Board that the Petitioner made no bona fide effort to evaluate the evidence before it, is invalid because it is based on the equally invalid presumption that the petitioner knew of the Board's view of the law?

The Board found it necessary to culminate its arbitrary action in this proceeding by charging that the Petitioner had made "no bona fide effort to evaluate all the evidence before it". (R. 79.) The Petitioner,

although it is a corporation, is not insensitive to the charge of bad faith which the Board has gratuitously fastened upon it.

In our brief, pages 113 to 118, inclusive, we argued that as a matter of law this finding was invalid because it was based on the equally invalid presumption that the Petitioner knew at the time of the events in question that the Board would cast upon it, after the **fact**, a duty to evaluate the evidence. Up to that time the announced rule of the Board had been, as stated by the Trial Examiner, that:

“In each such instance, however, the Board has required knowledge by the employer, derived from information in its possession at the time it effectuated the discharge. This information has heretofore been of such a nature as not to require any interpretation of evidence, or any independent investigation on its part.” (R. 63-64.)
64.)

In a footnote appended to the above quotation the Trial Examiner says:

“In the Rutland court case, for example, the business agent of the A.F. of L., the contracting union, called the employees into the office of the employer where both the employer and the union agent pressed them to state to which labor organization they gave allegiance. When they answered that they preferred the CIO, the agent stated to the employer that the employees had ‘double-crossed’ him and forthwith replaced them by others. No reason other than their interest in the CIO was alleged.

In *Portland Lumber Mills*, the dischargee showed the employer the formal charge against him which stated that he had given 'aid and support to a dual organization'." (R. 64.)

From the foregoing it may be concluded that up to the time that this case was adjudicated the Petitioner was under no duty to interpret or evaluate evidence, and, therefore, committed no actionable wrong in failing to comply with this duty, and the Board does not make any contention to the contrary. The Board does maintain, however, that the Petitioner has done something of which it disapproves and that for this reason the Petitioner must be punished.

This approach to the problem is, of course, law-making in the guise of adjudication and not unlike the type of law making described by Bentham in "*Truth v. Ashhurst; Or the Law as it is, contrasted with what it is said to be.*" There, Bentham, speaking of certain common law judges, says:

"It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait til he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make laws for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by until he has done something which they say he should not *have done*, and then they hang him for it. What way, then, has any man of com-

ing at this dog-law? Only by watching their proceedings: by observing in what cases they have hanged a man, and what cases they have sent him to jail, in what cases they have seized his goods, and so forth.”

Works of Jeremy Bentham, Volume 5, p. 235.

We hardly need say that this type of law making in the guise of adjudication by administrative agencies who are neither responsible nor responsive to the public will, is despotic and abominable. Unless such agency action is set aside by the reviewing Courts we will have come to the position where there are “no such things as rules or principles: there are only isolated dooms.”⁶

In oral argument counsel for the Board in response to a question by Judge Bone, said in substance, on the question of employer knowledge, that in certain instances the Board required independent investigation by the employer of the Union motivation,—that in others it did not,—*that the problem was approached on a case to case basis*. This makes it clear that the Board’s definition of the law excludes rules or principles of general application or the equal and equitable application thereof. We can say of this error, as does Mr. Justice Cardozo, that:

“A definition of law which in effect denies the possibility of law since it denies the possibility of rules of general operation, must contain within itself the seeds of fallacy and error.”⁷

⁶Cardozo, *The Nature of the Judicial Process*, p. 126.

⁷Cardozo, *op. cit.* pp. 126, 127.

That there is a purpose in the Board's adoption of, and application of this erroneous and fallacious definition of law is unquestionable. The Board may thereby, as in the instant case, adjudicate as it pleases, without regard to rule or principle. It may in the face of overwhelming direct evidence rely on invalid and prohibited inferences and presumptions to stigmatize litigants and deprive them of their property. The instant case furnishes a perfect example of the Board's method: The direct evidence in the record overwhelmingly pointed to lack of knowledge of the union's true motivation. The record, therefore, required an affirmance of the Trial Examiner's findings, but the Board had determined to rule against the Petitioner. Accordingly, it invented solely for the purposes of this case, a "presumption of knowledge" and a "presumption of bad faith" to overcome the record and the presumption of good faith and fair dealing.

The conclusions we have reached with reference to the Board's approach to this problem is not just the reaction of a disappointed litigant. In proof of this we submit for consideration the view which the editors of the Labor Relations Reporter took of the Board's treatment of this problem and of its action herein:

"Notwithstanding more than a decade of administrative and judicial interpretation of the Wagner Act, and notwithstanding its major importance to both employers and unions, no reasonably certain answer, capable of advance application to different factual situations, can yet be found in the decisions to settle this question:

‘When does a closed shop or membership-maintenance contract protect an employer against reinstatement and back-pay orders if he complies with the contracting union’s demand for the discharge of an employee because of suspension or expulsion from the union?’

Even the Board’s earlier decisions, before the controversy assumed its current importance, *revealed only shifting and differing answers from year to year*. Some cases would hold that the contract insulated the employer from discriminatory discharge complaints; others just as positively ruled that they did not. (Analysis, Oct. 29, 1945) * * *

It is the ‘knowledge test’ which the present decision expands. In effect, the present decision *creates a presumption of knowledge* where it is found that the employer had information indicating that the motive of the contracting union *might* have been reprisal against ‘dual-unionists’ at a time when the Board considered the closed-shop contract ‘open’ for a new determination of representatives, and ‘made no bona fide effort to evaluate all the evidence before it.’

The Board may, however, reach contrary results in applying the ‘knowledge’ test, even when some factors tend to indicate at least constructive knowledge. Thus in a recent case it was indicated that some of the supervisory employees were probably aware of the motivation of the contracting union, but the Board, by a vote of two-to-one, held that the facts were not such ‘as to warrant a finding that the knowledge it possessed placed this employer under duty to inquire further as to the motivating factors in the expulsion by the

union of these employees.’ (Spicer Mfg. Corp., 18 LRRM 1326.)” (Italics supplied.)

Analysis, Sept. 23, 1946, 18 Labor Relations Reporter 85, pp. 86-87.

We submit that the matter hereinabove discussed presents a relevant question of law which the Court should decide on rehearing contrary to the Board’s contentions, otherwise we shall have truly reached the position where there “are no such things as rules or principles: there are only isolated dooms” .

Dated, San Francisco, California,
February 2, 1949.

Respectfully submitted,

PHILIP S. EHRLICH,

BARTLEY C. CRUM,

R. J. HECHT,

*Attorneys for Petitioner,
Colgate-Palmolive-Peet Company.*

CERTIFICATE OF COUNSEL.

I certify that in my judgment the within petition for a rehearing is well founded and that it is not interposed for delay.

Dated, San Francisco, California,

February 2, 1949.

R. J. HECHT,

*Of Counsel for Petitioner,
Colgate-Palmolive-Peet Company.*

No. 11524

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN S. BLEKER, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

KENNY AND COHN,

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No. 11524

IN THE

United States Court of Appeals

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JOHN S. BLEKER, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

To the Honorable William Denman, Chief Judge, and the Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Petitioner, the appellant, John S. Bleker, Jr., respectfully urges this Honorable Court to grant him a rehearing upon the judgment on appeal filed May 26, 1949.

I.

Preliminary Statement.

The appellant Bleker was acquitted of three of the four counts on which he was jointly indicted with two of his subordinates in the Marine Corps Post Exchange at Camp Pendleton. One of his co-defendants, Gleason, pleaded guilty to two counts and the other, Robinson, was found guilty on three.

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I.

Preliminary Statement.

The appellant Bleker was acquitted of three of the four counts on which he was jointly indicted with two of his subordinates in the Marine Corps Post Exchange at Camp Pendleton. One of his co-defendants, Gleason, pleaded guilty to two counts and the other, Robinson, was found guilty on three.

By this petition for rehearing Major Bleker is still trying to extricate himself from the original position in which he was placed by the joint indictment. His acquittal on the conspiracy count has indeed been an empty victory up to date.

The appellant Bleker remains the forgotten man of this case. The trial transcript, the appeal briefs, even the opinion of this Court all reflect the principal concern of the jury and Court with the misdeeds of Robinson and Gleason.

Thus, although he was acquitted of it, the smearing effects of the original conspiracy charge have continued to pervade the case against Major Bleker. The salient facts that point to his own innocence are still obscured although this Court did say in its opinion (p. 5):

“The direct evidence was considerably less against Bleker than Robinson.”

In considering how much “less” that evidence was it should be recalled that Major Bleker did not receive one penny from the illegal activities of his subordinates. Furthermore, he repeatedly warned them against “kickbacks” and dishonest conduct of any kind. [This was the testimony of the Government’s own witness, Tr. 728, 894.] He misled no one, defrauded no one. Rather, Major Bleker was the one defrauded—defrauded by a misplaced faith in his subordinates—his old comrades in arms.

Before the badge of guilt is to be forever substituted by this Court for the honors earned by appellant Bleker in

nearly seven years of service which saw his promotion from private to major, he simply asks in this petition that the record be re-read with a single question in the mind of the Court. Would the jury's verdict be the same if he were tried alone for the single substantive offense of which he now stands convicted?

Appellant Bleker submits that to this question, a negative answer is inescapable—that he certainly would be acquitted by a jury confronted with the sole task of determining the culpability of what he, Bleker, did or did not do.

The record demonstrates that Major Bleker could not have been rescued from his present plight no matter how carefully his counsel might have phrased his motions or how carefully the Court might have limited the legal effect of the damaging testimony.

The deadly work was done when he was charged and tried for conspiring with Robinson and Gleason. That work can only be undone by giving Major Bleker a new, separate trial.

Then, and only then, can his case be tried, free from the pervasive stench of the hotel room intrigues and black market furtiveness of the others, from whom he has now been cleared of criminal association. The favorable outcome of that kind of a trial for Major Bleker is hardly even in doubt. It is that chance which he asks this Court to give him by granting a rehearing and reversing the judgment.

II.

The Opinion of This Court Is Confined to the Naked Question of the Admissibility of Evidence and Has Not Considered Its Harmful Effect in the Context of a Disproved Conspiracy.

This Court stated at page 5 that:

“An analysis of the entire record establishes that all the evidence admitted against him (Bleker) was either unquestionably admissible or at least admissible within the discretion of the trial court in connection with Count 1—the conspiracy count.”

Appellant submits that mere admissibility is not enough in the case of a disproved conspiracy, particularly in the light of *Krulewitch v. U. S.*, 93 L. Ed. Adv. Ops. 623, decided after this matter was submitted on oral argument.

This was the case in which Mr. Justice Jackson said at page 627:

“This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the ‘tendency of a principle to expand itself to the limit of its logic.’ The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or *in addition thereto*, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.” (Emphasis supplied.)

The fact that evidence might have been technically admissible against appellant Bleker on the conspiracy count does not mean that an injustice to him could not result. As was said in the *Krulewitch* case at page 631:

“It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.”

Truly, this has been a matter in which it was difficult for appellant Bleker to make his case stand upon its own merits. In such a case “admissibility” alone cannot be the yardstick to determine whether justice was administered.

Appellant submits that the true yardstick is the “prejudicial effect” of evidence that ultimately turns out to be irrelevant. If it is prejudicial to the point where the jury cannot reasonably be expected to erase its effect from their minds, then justice calls out for the granting of a new trial.

III.

This Court Was Not Justified in Holding That Appellant Bleker Waived His Objections by Silence and, in Any Case, the Prejudicial Effect Could Not Have Been Removed.

Appellee government conceded that appellant Bleker moved to strike *all* of the testimony covered by Specifications of Error 5 to 11, inclusive, and 13. (Rep. Br. 96.)

Nevertheless this Court, at page 6 of its opinion, has described appellant Bleker's position as that of one "who was silent when he should have spoken." But it is apparent that the fault of appellant Bleker, if any, was not that he did not speak but that he spoke too much—or at least too broadly—in framing his objection. Surely the greater includes the lesser.

But even if the appellant Bleker had couched his objection in precisely correct terms and the Court below had heeded the objection there is little likelihood that the prejudicial effect of the testimony would have been overcome.

Here again the *Krulewitch* case should be cited, at page 631 :

"When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a *hodge podge of acts and statements by others* which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy

itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. *The naïve assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co., 167 F. 2d 54.*" (Emphasis supplied.)

Conclusion.

Rule 25 of this Court requires a certificate of counsel that a petition for rehearing is well-founded. In this case, counsel not only makes such representation but makes the additional statement that a new trial in this case for appellant Bleker would definitely result in restoring him to a position of unstained honor in the country which he served so long and well.

Respectfully submitted,

KENNY AND COHN,

ROBERT W. KENNY,

MORRIS E. COHN,

ROBERT S. MORRIS, JR.,

Attorneys for Appellant Bleker.

Certificate of Counsel.

The undersigned is one of counsel for the appellant Bleker and one who has prepared the within petition for rehearing. In my judgment this petition is well founded. Furthermore, it is not interposed for delay.

ROBERT W. KENNY.



United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

ARROW STEVEDORING COMPANY, a Corpo-
ration,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

APR 24 1948

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY, a Corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

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Northern District of California.

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Northern District of California,
Post Office Building,
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Attorneys for Respondent and Appellant.

JOHN H. BLACK,
EDWARD R. KAY,
233 Sansome Street,
San Francisco, California,

Attorneys for Respondent-Impleaded and
Appellee.

On appeal from the United States District Court
for the Northern District of California, Southern
Division.

Trial before the Honorable Louis E. Goodman,
District Judge, sitting without jury.

In the United States District Court for the Northern District of California, Southern Division,
in Admiralty

No. 24608-G

EDGAR E. REITE, as Personal Representative
and Administrator of the Estate of JOHN
HENRY MITCHELL, Deceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LONGSHOREMEN'S ADMINISTRATOR'S
LIBEL IN PERSONAM

(For damages under the Suits in Admiralty Act and
the Public Vessels Act)

To the Honorable the Judges of the Above-Entitled
Court:

The libel of Edgar E. Reite, personal representative and administrator of the estate of John Henry Mitchell, deceased longshoreman, against the United States of America and the United States Naval vessel PA-164, owned, managed, navigated and operated by said United States of America, and against

all persons lawfully intervening in their interests, in a cause of action for damages under the Public Vessels Act and the Suits in Admiralty Act, civil and maritime, alleges: [1*]

I.

That the United States vessel, PA-164, is a vessel of United States registry and now is and during all of the times herein mentioned was owned, operated, managed and navigated by the United States of America as a Naval vessel, and was and is a public vessel of the United States.

II.

That libelant is a resident of the City and County of San Francisco, State of California, and resides within the jurisdiction of the above-entitled Court.

III.

That at the time of the acts of which complaint is herein made, the said PA-164 was within the jurisdiction of the above-entitled Court, and at the time of the filing of this libel is, or soon will be, within the jurisdiction of the above-entitled Court.

IV.

That libelant brings and maintains this action pursuant to and under the provisions of the Public Vessels Act, 46 USCA Sections 781 through 790; and the Suits in Admiralty Act; 46 USCA Sections 741 and 752.

*Page numbering appearing at foot of page of original certified Transcript of Record.

V.

That the respondent, United States of America, maintains an office and principal place of business in connection with the matters of which complaint is herein made in the City and County of San Francisco, State of California, and said respondent is within the jurisdiction of the above-entitled Court.

VI.

That heretofore, to wit, on May 31, 1946, libelant was appointed administrator of the estate of John Henry Mitchell, deceased, by order of the Superior Court of the State of California in and for the County of Alameda in action No. 94842 Probate. That on said day Letters of Administration were issued to libelant by said court in said action, and libelant since said date has been and now is the duly qualified and acting administrator of the estate of John Henry Mitchell, deceased. That libelant brings and maintains this action for and on behalf and benefit of the sole and only surviving heir at law of the deceased, namely, Ozrie Mitchell, his widow, who was dependent upon the deceased for her support.

VII.

That on or about May 28, 1945, at or about the hour of 7:30 a.m., the said vessel PA-164 was docked at Pier 18, San Francisco, California. That at said time and place the deceased John Henry Mitchell was employed by the Arrow Stevedoring Company as a stevedore, and was working and employed

aboard said vessel within the course and scope of said employment, and was a business invitee of respondent aboard said vessel. That at said time and place and in company with other stevedores, the deceased was in the hold of the No. 4 hatch where he was engaged in working cargo. That at said time and place a hatch cover or tank top fell from the top of said hatch into the said hold and fell upon the said John Henry Mitchell, causing him severe and grievous bodily injuries which resulted in his death on May 28, 1945. That respondent at said time and place kept and maintained said vessel, her gear, appurtenances and appliances and the said #4 hatch in an unseaworthy condition in the following respects: (1) respondent failed to provide a suitable means for locking and securing the said hatch cover or tank top so that it would not fall into said hold, as aforesaid; (2) respondent left said hatch cover or tank top in a dangerous position, namely, in an upright position above said hatch, and because of the construction of said hatch cover or tank top said upright position was the only way in which it could be left, and thereby the construction of said hatch [3] cover or tank top invited or caused the accident which occurred; (3) respondent failed to provide a suitable and proper hook, lock or other device to secure said tank top or hatch cover, so that it would not fall into said hold as occurred.

VIII.

That respondent was negligent in that respondent failed to safely and properly secure the said tank top or hatch cover so that it would not fall into said

hold, and negligently failed to provide hooks, locks or other devices for the purpose of securing said tank top or hatch cover, and negligently and carelessly left said tank top or hatch cover in an upright position above said hold so that the said tank top or hatch cover was in a position where it could readily and it did fall into said hold, causing the accident which resulted in the death of John Henry Mitchell, as herein described.

IX.

That at the time of his death the deceased was of the age of thirty-five years and had a life expectancy of 33 years. That the deceased was in good health and was earning wages in the approximate sum of \$3,000 per year. That as a result of the negligence and carelessness of respondents and the unseaworthiness of said vessel, as hereinabove alleged, which caused the death of the deceased, Ozrie Mitchell, the widow of the deceased, has been wrongfully denied and deprived of the financial support, care, maintenance, comfort, society, and companionship of the said John Henry Mitchell, all to her general damage in the sum of \$75,000.

X.

That the said Ozrie Mitchell, widow of said deceased, has incurred special damage by way of funeral bills for the burial of said deceased in the amount of approximately \$500, which special damage has been caused by the negligence and carelessness of respondent herein. [4]

XI.

That all and singular, the allegations herein are true and are within the admiralty and maritime jurisdiction of the above-entitled Court.

Wherefore libelant prays that process in due form of law according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction may issue against respondent and that respondent be required to appear and answer upon oath all and singular the matters aforesaid pursuant to the statutes of the United States in matters of this kind, and that this Honorable Court may be pleased to decree the payment by respondent of the sum of \$75,500, plus costs of suit herein and for such other and further relief as is meet and just in the premises.

Dated: June 10, 1946.

GLADSTEIN, ANDERSEN,
RESNER, SAWYER &
EDISES,
HERBERT RESNER,
Proctors for Libelant. [5]

State of California,
City and County of San Francisco—ss.

Ed Reite, being first duly sworn, deposes and says:

That he is the person named in the within and foregoing libel; that he has read said libel and knows the contents thereof; that same is true of his own

knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true.

EDGAR E. REITE.

Subscribed and sworn to before me this 10th day of June, 1946.

[Seal] ALICE C. MORSE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed June 11, 1948. [6]

[Title of District Court and Cause.]

ANSWER

Now comes the respondent, United States of America, by Frank J. Hennessy, United States Attorney for the Northern District of California, and answering the above captioned libel respectfully alleges:

I.

Respondent admits the allegations of Article I of said libel.

II.

Respondent has no information or belief upon the allegations of Article II and therefore denies said allegations.

III.

Respondent admits the allegations of Article III.

IV.

As to the allegations of Article IV respondent leaves matters of law to the Court.

V.

Respondent admits the allegations of Article V.

VI.

Respondent has insufficient information or belief to enable it to answer the allegations of Article VI and demands strict proof thereof.

VII.

As to the allegations of Article VII respondent admits that the deceased John Henry Mitchell was upon said vessel as a stevedore in the employ of the Arrow Stevedoring Company, in the course of his said employment and that at said time and place he received some injury from a falling hatch cover, or tank top. Respondent does not have sufficient information or belief regarding the death of said John Henry Mitchell and demands strict proof thereof. Respondent denies the remaining allegations of said Article VII.

VIII.

As to the allegations set out in Article VIII respondent denies that any injuries sustained by the deceased as in said Article alleged, or at all, were proximately, or at all, caused by the alleged, or any negligence and/or carelessness of the respondent, or of its officers, or agents, or servants, or employees in the particulars alleged or in any matters at all. Denies that respondent or its officers, or agents, or servants or employees were negligent and/or careless in or about any of the matters alleged in regard to the safety and proper security of said tank top or hatch cover, in the providing of hooks, locks or

other devices for the purpose of securing said tank top or hatch cover, or in leaving said tank top or hatch cover in an upright position, or any position above said hold, so that it could readily fall and/or that it did fall into said hold.

In this connection respondent alleges that at all times in said article mentioned the said tank top or hatch cover was provided with a suitable and proper locking device consisting of locking hooks, chains and locking pins designed for, and proper and suitable for the purpose of holding said tank top or hatch cover securely when the same was in an upright position, and that if properly used said devices were sufficient to and would have prevented said tank top or hatch cover from falling, or being caused to fall by any normal operation of loading or unloading said vessel. Respondent further alleges that at no time mentioned in said libel was said tank top or hatch cover warped or defective, but was at all times in such good working condition that it could have been placed in the proper position for engaging with the hook chains and pins before mentioned, provided for the purpose of securing said tank top or hatch cover against falling; that at all times mentioned the aforesaid devices for holding said tank top or hatch cover in place were provided with proper locking pins; that at all times in said Article mentioned the deceased was by respondent afforded a safe place to perform his work as stevedore; that at all times mentioned in said Article the said tank top or hatch cover was opened, and left open by the said Arrow Stevedoring Company, its

officers, agents, servants [9] and employees; that at no time in said Article mentioned did respondent, its officers, or agents, or servants, or employees or members of the crew of said vessel have notice of, or reason to believe, that the said tank top or hatch cover was insecure in the matters alleged or at all.

IX.

Respondent has insufficient information or belief regarding the age, life expectancy, health and earning capacity of deceased and demands strict proof thereof. Denies the remaining allegations of said Article.

X.

Respondent denies the allegations of Article X.

XI.

Article XI alleges matters for the Court to decide.

Further Answering and as a First Separate and Distinct Defense to Said Libel:

I.

Respondent alleges upon information and belief that any injuries to, or damages suffered by libelant were sustained solely by libelant's own negligence and by the negligence of those exercising supervision and control over said libelant in the premises in said libel set forth. Respondent in this connection alleges that such damages and injuries if any there were, were not caused or contributed to in any manner by any fault or negligence of respondent, its servants, agents or representatives.

Further Answering, and as a Second Separate and Distinct Defense to Said Libel: [10]

Respondent alleges that at the time and place in said libel set forth libelant was not an employee of the United States through the War Shipping Administration or otherwise, but on the contrary was an employee of the said Arrow Stevedoring Company working on board the Naval Vessel PA-164, a public vessel of the United States, and that the damages claimed by libelant were not caused by said public vessel but on the contrary were as respondent is informed caused by the falling of a tank top or hatch cover on board said public vessel not employed as a merchant vessel; and that the cause of action stated by the libel is not one respecting which the United States has consented to be sued under the Public Vessels Act, 1925 (46 USC 781 et seq.), the War Shipping Administration (Clarification) Act, 1943, sometimes referred to as Public Law 17 (50 USC appx. 1291), the Suits in Admiralty Act, 1920 (46 USC 741 et seq.) or under any other provision of law whatsoever.

Wherefore respondent prays that the libel may be dismissed with costs.

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ WILLIAM E. LICKING,

Asst. United States Attorney.

/s/ C. ELMER COLLETT,

Asst. United States Attorney,

Proctors for Respondent,

United States of America.

[Endorsed]: Filed Oct. 1, 1946. [11]

[Title of District Court and Cause.]

PETITION TO BRING IN THIRD PARTY
UNDER RULE 56

To the Honorable, the Judges of the Above-Entitled
Court Sitting in Admiralty:

The Petition of The United States of America,
respondent herein, respectfully shows:

I.

Upon information and belief that at all times hereinafter mentioned the Arrow Stevedoring Company, a corporation, (hereinafter called "said Company") was and now is a corporation organized and existing under the laws of the State of California and has a principal place of business in the City and County of San Francisco, California, within the jurisdiction of this Court.

II.

That on or about June 11, 1946, Edgar E. Reite as personal representative and administrator of the estate of John Henry Mitchell, deceased, filed his libel in personam now pending herein against petitioner, The United States of America, wherein libelant claims the sum of \$75,000.00, together with special damages for personal injuries. A copy of said libel is hereto attached, marked Exhibit "A" and by reference made a part hereof;

III.

That on or about June 30, 1944, the said Company entered into a written contract with petitioner,

the United States of America, which said contract, with changes herein immaterial [12] was at all times mentioned in said libel, and now is in full force and effect, said contract being designated N220S-9750A; that by the terms of said contract said Company agreed to furnish and perform the necessary services and to furnish the necessary labor for loading and stevedoring certain vessels and to indemnify and save harmless the United States against all loss or damage in connection therewith; that at the time of the alleged occurrence of the injuries alleged in said libel said Company was engaged in furnishing labor and performing services under the terms of said contract on board said vessel and that the said Company, its agents, servants and employees were in sole and exclusive control of the hatch openings and hatch covers on board said vessel about which libelant and other members of the stevedore gang were working, and of all portions of said vessel, its gear and appurtenances connected with the happening of the alleged injuries to libelant in said libel described.

IV.

Petitioner further alleges, upon information and belief that any injuries sustained by libelant on board said vessel, if any there were, were the consequence of his having been struck by a falling hatch cover while he was working on said vessel in the course of his employment by said Company in its performance of the contract aforesaid, and that said libelant was injured solely as a direct and prox-

mate result of the careless, reckless and negligent manner in which said hatch cover had been placed, arranged, secured and maintained by said Company, its servants, agents and employees, and by the improper, careless and negligent manner in which said Company, its servants, agents and employees conducted themselves and their activities in the vicinity thereof of said vessel.

V.

That if petitioner is under any liability by reason of [13] any of the matters alleged in said libel, such liability was solely and proximately caused by the fault and negligence of said Company, its servants, agents and employees in respect of the matters in paragraph IV hereof set forth; by reason whereof any and all such liability should be borne by said Company and not by petitioner, and that said Company is wholly or partially liable to petitioner by way of indemnity or contribution, or other remedy over or otherwise, and that said Company should be proceeded against by libelant directly and in the place and stead of this petitioner.

VI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, petitioner prays:

1. That process in due form of law may issue against said Arrow Stevedoring Company citing it

to appear and answer all and singular the matters of this petition and of the libel herewith exhibited.

2. That said Arrow Stevedoring Company may be proceeded against as if originally made a party herein, and that if the Court shall find that libelant is entitled to a decree, then that said decree be entered against said Arrow Stevedoring Company, and that the Court may dismiss said libel as against this petitioner with costs.

3. That petitioner may have such other and further relief and redress as the Court is competent to give in the premises.

/s/ FRANK J. HENNESSY,
United States Attorney. [14]

/s/ WILLIAM E. LICKING,
Asst. United States Attorney.

/s/ C. ELMER COLLETT,
Asst. United States Attorney,
Proctors for Respondent,
United States of America.

[Endorsed]: Filed Oct. 1, 1946. [15]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 24608-G

EDGAR E. REITE, as Personal Representative
and Administrator of the Estate of JOHN
HENRY MITCHELL, Deceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

and

ARROW STEVEDORING COMPANY, a Corpo-
ration,

Respondent-Impleaded.

ANSWER OF ARROW STEVEDORING COM-
PANY, A CORPORATION, TO PETITION
OF THE UNITED STATES OF AMERICA
AND ANSWER TO LIBEL

Comes now Arrow Stevedoring Company, a cor-
poration, respondent-impleaded herein, and answer-
ing the petition and libel, alleges as follows:

ANSWER TO PETITION OF THE UNITED
STATES OF AMERICA

I.

Admits the allegations of Article I.

II.

Admits the allegations of Article II, save and
except the reference made to the libel therein, and
this respondent-impleaded refers to its answer to
libel hereinafter set forth. [16]

III.

Answering the allegations of Article III, respondent-impleaded alleges that there was in effect a contract between the United States of America and Arrow Stevedoring Company, said contract being designated as "N220-S-9750A," and save and except as hereinabove admitted and alleged, denies the allegations of Article III.

IV.

Answering the allegations of Article IV, respondent-impleaded alleges that libelant was injured by being struck by a hatch cover while working on the vessel in the course of his employment by Arrow Stevedoring Company, respondent-impleaded herein, and save and except as hereinabove admitted and alleged, denies the allegations of Article IV.

V.

Answering the allegations of Article V, respondent-impleaded alleges that it is under no liability by reason of any of the matters or things alleged in the petition of the United States of America, or said libel herein, and placing its denial upon said ground, denies the allegations contained in Article V, insofar as they concern, refer to or charge this respondent-impleaded.

VI.

Answering the allegations of Article VI, respondent-impleaded leaves open all questions of jurisdiction to the above-entitled court.

VII.

Further answering the allegations of said petition of the United States of America filed herein, this respondent-impleaded alleges that the death of John Henry Mitchell was not caused by any fault, negligence or omissions on the part of its agents, servants or employees; that said respondent- [17] impleaded has paid to heirs and personal representatives of John Henry Mitchell, deceased, by way of indemnity payments pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901, the sum of \$1,282.41.

ANSWER TO LIBEL

Answering the allegations of the libel herein which said libel has been attached to the petition of the United States of America and made a part thereof, this respondent-impleaded does allege as follows:

I.

Admits the allegations of Article I.

II.

Answering the allegations of Article II, respondent-impleaded has no information concerning the same and demands strict proof thereof.

III.

Answering the allegations of Article III, respondent-impleaded admits that USS "Edgecomb," also known as PA-164, was lying in the navigable waters of the United States of America, to wit: San Francisco Bay, at the time of the happening of the accident to John Henry Mitchell, deceased.

IV.

Answering the allegations of Article IV, respondent-impleaded leaves open all questions of jurisdiction to the above-entitled Court.

V.

Admits the allegations of Article V.

VI.

Answering the allegations of Article VI, respondent-impleaded has no information as to whether said deceased, John Henry Mitchell, left heirs at law other than Ozrie Mitchell, [18] his widow, and demands strict proof thereof.

VII.

Answering the allegations of Article VII, respondent-impleaded alleges that John Henry Mitchell, deceased, met his death while in the employ of respondent-impleaded in the capacity of a stevedore aboard said vessel, and save and except as hereinabove admitted and alleged, respondent-impleaded has no information concerning the same and demands strict proof thereof.

VIII.

Answering the allegations of Article VIII, this respondent-impleaded admits that respondent, United States of America, was negligent in and about the matters and things set forth in said article.

IX.

Answering the allegations of Article IX, respondent-impleaded has no information concerning the life expectancy or the earning capacity of said

deceased, and demands strict proof thereof, and denies that the death of John Henry Mitchell was caused by any carelessness or negligence of this respondent-impleaded, and further denies that Ozrie Mitchell, widow of deceased, has been damaged in the sum of \$75,000, or any other sum or sums or otherwise or at all insofar as this respondent-impleaded is concerned.

X.

Denies the allegations of Article X.

XI.

Answering the allegations of Article XI, respondent-impleaded leaves open all questions of jurisdiction to the above-entitled Court.

XII.

Further answering allegations of said libel, this respondent-impleaded alleges that the death of John Henry Mitchell [19] was not caused by any fault, negligence or omissions on the part of its agents, servants or employees; that respondent-impleaded has paid to the heirs at law of John Henry Mitchell, deceased, the sum of \$1,282.41 as and for indemnity payments pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901.

Wherefore, respondent-impleaded prays that said petition be dismissed and that if any recovery be had by libellant against respondent, United States of America, this respondent-impleaded be awarded the sum of indemnity payments paid pursuant to

the Longshoremen's and Harbor Workers' Compensation Act, and that it have its costs of suit herein incurred.

JOHN H. BLACK,
EDWARD R. KAY,

Proctors for Arrow Stevedoring Company, a Corporation. [20]

State of California,
City and County of San Francisco—ss.

Fred John Foster, being first duly sworn, deposes and says:

That he is an officer of Arrow Stevedoring Company, a corporation, to wit: Secretary: that as such officer he is empowered to make this verification; that he has read the foregoing answer to Petition of the United States of America and Answer to Libel, and knows the contents thereof; that the same is true and correct of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

FRED JOHN FOSTER.

Subscribed and sworn to before me this 21st day of January, 1947.

[Seal] EMMA L. MacHUGH,
Notary Public in and for the City and County of
Francisco, State of California.

My commission expires Jan. 15, 1948.

[Endorsed]: Filed Jan. 23, 1947.

[Title of District Court and Cause.]

ORDER FOR DECREE

Let a decree enter in favor of libelant and against the United States for the sum of \$18,000.00 damages and in favor of interpleaded respondent, Arrow Stevedoring Company, a corporation.

Counsel will prepare and present findings and decree in due course.

Dated: June 10, 1947.

MICHAEL J. ROCHE,

United States District Judge.

LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed June 10, 1947.

[Title of District Court and Cause.]

IMPLEADED RESPONDENT'S PROPOSED
FINDINGS OF FACT AND CONCLUSION
OF LAW AND DECREE

This cause having duly come on for trial before the court on the 11th and 24th days of February, 1947, and the 18th day of April, 1947, and the parties having appeared by their respective proctors, and evidence having been received, and the matter having been duly submitted to the Court for determination, the Court hereby finds and concludes as follows:

FINDINGS OF FACT

1. On May 28, 1945, the decedent, John Henry Mitchell, was employed as a stevedore by the impleaded respondent Arrow Stevedoring Company, and on said day he and five other stevedores were working at the level of the third deck in the No. 4 port hatch of the U.S.S. Edgecombe.

2. Said Arrow Stevedoring Company was engaged in unloading boxes of empty artillery shells through said hatch under a contract with the United States as the owner of the vessel.

3. The decedent and said other five stevedores boarded said vessel about 7 a.m. on said day and went below to the third deck in said hatch for the purpose of unloading said shells.

4. Said shells were in the lower compartment of said hatch, and completely filled the same.

5. Said lower compartment had a square hatch cover which was hinged on the inboard side, and which weighed about 3500 pounds.

6. A gang of stevedores employed by Arrow Stevedoring Company had worked in the said No. 4 port hatch up to 6:00 a.m. on the morning of May 28, 1945, but none of the said gang or any other employee of Arrow Stevedoring Company was employed in and about the said hatch between 6:00 on May 28, 1945, until 7:00 a.m. on May 28, 1945, when the said John Henry Mitchell, deceased, and his fellow stevedores commenced to work in the said hatch. [23]

7. The decedent and two other stevedores stood on top of said cargo for the purpose of commencing said work of unloading said hatch and a cargo board was lowered through the hatch by means of a winch and boom. Said cargo was lowered carefully and neither it nor the cable or falls struck the hatch cover while said cargo board was being lowered. After the cargo board came to rest on top of the cargo, said hatch cover suddenly fell shut and crushed the decedent beneath it and thereby inflicted upon him fatal injuries.

8. The hatch cover which fell was at least 8 feet measured athwartship and about 14 feet long measured fore and aft. Two dogs were provided for the purpose of securing and preventing the hatch cover from falling shut when it stood in vertical or open position. One dog was attached to the forward bulkhead of the hatch, and the other dog was attached to the aft bulkhead of the hatch. Each dog swung on a shaft which extended in a fore and aft direction from the bulkhead. When the hatch cover was raised to a vertical position, each dog was intended to swing down upon the upturned edge of the hatch cover, so that the hook on the end of the dog would extend beyond the edge of the cover and down a few inches from the top edge of the cover so as to grip it and hold it from falling. Each dog had a hole in its side, and, when the dog was gripping the hatch cover, it was intended that a metal locking pin would be inserted through said hole and into a hole in the bulkhead, so as to lock the dog and prevent the

same from raising and thereby releasing its grip on the hatch cover. A locking pin for the forward dog was attached to the bulkhead by means of a chain near the dog.

9. At the time of said accident the aft dog, that is to say, the dog attached to the aft bulkhead, was defective, in that the same did not extend far enough to permit the hook [24] on the end thereof to reach past the edge of the cover so as to grip the same when the cover was standing in its normal open position. Instead, the hook would rest on the upturned edge of the hatch cover, in which position it could not grip the cover and could not and did not prevent the cover from falling.

10. At the time of the accident the forward dog, that is, the dog attached to the forward bulkhead was defective, in that the hook on said dog was worn or rounded and said dog would raise by itself, so as to release its hold or grip on said hatch cover.

11. At the time of said accident the forward dog and its locking pin were defective, in that said pin could not be fitted into the holes in said dog and in said bulkhead so as to lock said dog and prevent it from raising; and no other means were provided for locking said dog.

12. At the time of said accident there was a chain attached to the aft bulkhead for the purpose of holding a locking pin for the aft hook, but the pin therefor was missing, and no pin or other means were provided for locking the aft dog.

13. At the time of the accident no device, devices or means were provided for holding said hatch cover in an open or vertical position other than the dogs and pin heretofore mentioned.

14. The dogs were situated at a height beyond the reach of a person on said third deck. When such cover was opened and fastened by the navy personnel, it was the customary practice to push the dog into position by means of a broom handle or pole. A broom handle or pole was maintained on said deck for use for such purpose, but was an inadequate means of fastening the cover. The use of this method would leave the dog unlocked. The locking pin could not be inserted by the pole or broom handle. It could be inserted only by hand. No ready, convenient, suitable or proper means were provided on said vessel for reaching said [25] locking pin. Unless a box or similar object happened to be handy, the locking pin could be reached only by climbing to the top of the hatch cover. The latter method was dangerous to the personnel and was rarely, if ever, used.

15. Said vessel was a Navy cargo vessel owned by the United States. It was being used by and was in the control of the United States Navy, and was manned by a navy crew. It was the announced custom and practice on navy vessels and on said vessel for the navy personnel to open and fasten all hatch covers; orders had been duly given by the proper naval officers to a navy crew on said vessel to open and fasten said hatch cover when necessary to the work of the stevedores.

16. It was the custom and duty of a navy crew to open and fasten said hatch cover so that decedent and his fellow stevedores could unload said cargo.

17. At the time of said accident said forward dog, which had been holding the cover, became disengaged and thereby released its grip on the cover, and, since the other dog failed to reach far enough to grip the edge of the cover, there was nothing to hold said cover and it fell upon the decedent.

18. The said dogs and pin were defective in the particulars heretofore specified, and said vessel was unseaworthy in said particulars and by reason of the absence of suitable, adequate and proper means and devices for securely locking and fastening said hatch cover so that the same could not fall.

19. The United States and its officers, agents, servants, employees and crew upon said vessel knew, or in the exercise of ordinary care should have known, that said dogs and pin were so defective, and that said vessel was unseaworthy by reason of such defects and by reason of the absence of suitable, adequate and proper means and devices for securely locking and fastening said hatch cover so that it would not fall; and the United States was negligent in failing to remedy said defects [26] and in not taking proper and reasonable precautions to secure said hatch cover so it would not fall.

20. The fall of said cover and said fatal injuries were proximately caused by said defective and unseaworthy condition of said vessel.

21. Said navy crew failed to use reasonable care in fastening said hatch cover, and failed to fasten

it securely and safely so as to prevent its falling. The United States, and its officers, agents, servants and employees upon said vessel, were negligent and careless in the use and maintenance of said hatch cover and in leaving and maintaining it in an open position without taking suitable, proper and sufficient precautions to prevent the same from falling to a closed position; and in negligently and carelessly failing to provide a suitable locking device or devices to hold said hatch cover securely when the same was in an upright position so as to prevent the same from falling or being caused to fall in the course of the normal operations of loading and unloading; and by allowing and permitting said hatch cover to remain in an upright position when the respondent United States, and its officers, agents, servants, employees and crew upon said vessel, knew, or in the exercise of ordinary care should have known, that it was not adequately secured; and in failing to replace a locking pin which had been provided for and which was intended to engage the aft dog; and in negligently permitting said hatch cover to remain in an upright position while said aft pin was missing without providing other means to serve the purpose of said pin in holding said hook securely, so as to prevent the same from being jarred or otherwise displaced from its proper position as a locking device; and in failing to lock the forward dog which was provided for the purpose of securing said hatch cover from falling while the same was in [27] an upright position; and in negligently failing to use a locking

pin on said forward dog, so as to prevent the same from being jarred or otherwise displaced from its proper position when in place as a locking device; and in making negligent use of the locking dogs, pins and other devices provided for the purpose of securing said hatch cover from falling when the same was in an upright position; and that the respondent United States, and its aforesaid officers, agent, servants, employees and crew on said vessel, negligently failed to provide decedent, John Henry Mitchell, with suitable or adequate warning, or any warning, of the danger then and there existing by reason of the insecurity of said hatch cover while the same was in an upright position; and that said hatch cover fell from an upright position as the proximate result of the aforesaid negligence of the respondent United States, and its officers, agents, servants, employees and crew on said vessel.

22. As the proximate result of the falling of said hatch cover, the said John Henry Mitchell was killed.

23. Proctors for libelant, respondent and impleaded respondent have stipulated that damages for the death of the said John Henry Mitchell may be assessed in the sum of \$18,000.00.

24. Respondent-impleaded Arrow Stevedoring Company was not guilty of any negligence proximately causing or contributing to the accident.

25. It is not true that the hatch cover had been placed or arranged or secured or maintained in a careless or reckless or negligent manner by im-

pleaded respondent Arrow Stevedoring Company, or any servants or agents or employees of said Arrow Stevedoring Company, and it is not true that any servant or agent [28] or employee of the said Arrow Stevedoring Company conducted himself or his activity in a careless or reckless or negligent manner.

26. It is true that the decedent, John Henry Mitchell, was injured as the direct and proximate result of the defective and insufficient appliances owned, maintained, used and furnished by the respondent United States of America, and as the direct and proximate result of the negligent failure on the part of the respondent United States of America to furnish a reasonably safe place for the employees of the Arrow Stevedoring Company to perform their work and reasonably safe appliances with which to do the work at hand.

27. The contract between the respondent United States and the impleaded respondent Arrow Stevedoring Company, under which the stevedores were working, contained clauses providing for liability to the United States by the Arrow Stevedoring Company for loss or damage sustained by the United States as a result of negligence or wrongful acts or omissions of the officers, agents or employees of Arrow Stevedoring Company, or through the fault of the equipment or gear of Arrow Stevedoring Company. This covenant was subject to the limitation or condition that the Arrow Stevedoring Company shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the United

States, or resulting from compliance by officers, agents or employees of the Arrow Stevedoring Company with specific directions of the Port Director, N.T.S., 12th Naval District, nor for any loss or damage resulting from default of ships or other gear supplied by the United States.

28. The aforesaid accident and the injuries and damage caused thereby resulted from default of ship and gear supplied by the respondent United States. [29]

29. That libellant, Edgar E. Reite, as personal representative and administrator of the estate of John Henry Mitchell, deceased, is and at all times mentioned herein, was a resident of the City and County of San Francisco, State of California, within the jurisdiction of the above entitled court.

30. At all times herein mentioned the steamship U.S.S. Edgecombe was a steam cargo vessel owned by the respondent, The United States of America; and was a public vessel of the United States of America within the meaning of the Statute of March 3rd, 1925, Chapter 428; and at all times herein mentioned was being used by and was in the control of The United States Navy as a naval transport or cargo vessel; and that at the time of the happening of the accident hereinafter mentioned said vessel was lying in the navigable waters of the United States, in San Francisco Bay, in the State of California, and was berthed for the purpose of unloading at Pier No. 18 at the Port of San Francisco.

31. The respondent-impleaded, Arrow Stevedoring Company is a duly organized corporation, and

at the time of said accident said respondent-impleaded, by and through its stevedores in its employment, was engaged in the unloading of said vessel pursuant to said contract with the United States of America.

32. No award or order for payment of compensation has been filed by the deputy commissioner of the United States Employees Compensation Commission, and decedent's widow has not accepted compensation under an award or order filed by said deputy commissioner. A notice of election to sue has been duly filed with the United States Employees Compensation Commission at San Francisco, California, pursuant to Section 33 of the Longshoremen's and Harbor Workers' Compensation Act. [30]

CONCLUSIONS OF LAW

1. John Henry Mitchell, deceased, was engaged in maritime employment and his administrators are entitled to receive under the provisions of the Public Vessels Act.

2. The vessel U.S.S. Edgecombe was unseaworthy with respect to the means provided for securing the hatch cover so as to prevent its falling upon stevedores working in the hatchway.

3. The respondent United States was negligent and its negligence was the proximate cause of the fall of the hatch cover.

4. The decedent was not negligent.

5. The impleaded respondent Arrow Stevedoring Company was not negligent.

6. The fall of the hatch cover and the decedent's injuries were proximately caused by the defective and unseaworthy condition of said vessel in respect to the means for securing said hatch cover and by the negligence of the United States.

7. The respondent United States is liable to the libelant, under and by virtue of the terms of the Public Vessels Act for the injuries to the decedent caused by said unseaworthy condition and by its said negligence.

8. The respondent-impleaded Arrow Stevedoring Company is not liable to the libelant nor to the United States for any part of the loss or damage.

9. The libelant is entitled to recover damages in the sum of \$18,000.00 against the United States and judgment may be entered accordingly, together with libelant's costs in the sum of \$.....

Dated this 19th day of August, 1947.

LOUIS E. GOODMAN,

United States District Judge.

Receipt of copy of the foregoing proposed findings of fact and conclusion of law is hereby acknowledged this 16th day of June, 1947. Said proposed findings are approved as to form.

FRANK J. HENNESSY,

U. S. Attorney.

By WILLIAM E. LICKING,

Proctor for Respondent.

By C. ELMER COLLETT,

Ass't U. S. Atty.

By HERBERT RESNER,

Proctor for Libelant.

[Endorsed]: Filed Aug. 19, 1947. [32]

In the United States District Court for the Northern District of California, Southern Division

No. 24608-G

EDGAR E. REITE, as personal representative and administrator of the estate of JOHN HENRY MITCHELL, deceased,

Libelant.

vs.

UNITED STATES OF AMERICA,

Respondent,

and

ARROW STEVEDORING COMPANY, a Corporation,

Respondent-Impleaded.

DECREE

This cause having been heard on the pleadings and proofs, and having been duly submitted by the proctors of the respective parties, and the court having made and filed its findings of fact and conclusions of law, it is

Ordered, Adjudged and Decreed, that the libelant, Edgar E. Reite, recover of and from the respondent United States of America the sum of \$18,000.00, together with libelant's costs taxed in the sum of \$., and amounting in all to the sum of \$. with interest on said total sum at the rate of 4 per centum per annum from the date of this decree until paid; and it is further

Ordered, Adjudged and Decreed, that the impleaded respondent Arrow Stevedoring Company is not liable to libellant; and it is further

Ordered, Adjudged and Decreed, that the impleaded respondent Arrow Stevedoring Company is not liable to the United States of America, and that the petition of the respondent United States of America, under Rule 56 of the General Admiralty Rules, be and the same is hereby dismissed on the merits.

Dated this 19th day of August, 1947. [33]

LOUIS E. GOODMAN,

United States District Judge.

Receipt of copy of the foregoing Decree is hereby acknowledged this 16th day of June, 1947. Said Decree is approved as to form.

FRANK J. HENNESSY,

U. S. Attorney.

By WILLIAM E. LICKING,

Proctor for Respondent.

C. ELMER COLLETT,

Ass't. U. S. Attorney.

By HERBERT RESNER,

Proctor for Libellant.

[Endorsed]: Filed and Entered August 19, 1947.

Entered in Vol. 38, Judgment and Decrees at Page 292. [34]

[Title of District Court and Cause.]

RESPONDENT'S PETITION FOR APPEAL

Respondent, being agrieved by the rulings, findings, and judgment and decree made and entered therein by the above entitled United States District Court on August 19, 1947, claims an appeal from said rulings, findings, and judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that its said appeal may be allowed.

The points and grounds of appeal are the following:

1. The Court erred in finding that respondent impleaded, Arrow Stevedoring Company, was not negligent.

2. That the Court erred in finding that the respondent United States of America was not entitled to indemnity from respondent-impleaded, Arrow Stevedoring Company, under the terms of its contract with said company;

3. That the Court erred in finding that respondent United States of America was not entitled to full indemnity from respondent-impleaded, Arrow Stevedoring Company, under general law in the circumstances of the case.

Dated: November 14, 1947.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Proctors for Respondent,
United States of America.

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

Done in open court this 14th day of November, 1947.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Nov. 14, 1947. [36]

[Title of District Court and Cause.]

RESPONDENT'S DESIGNATION OF APOSTLES ON APPEAL AND P R A E C I P E THEREFOR

To Messrs. John H. Black and Edward R. Kay, 233 Sansome Street, San Francisco 4, California, Proctors for Arrow Stevedoring Company, and

To C. W. Calbreath, Clerk of the United States District Court for the Northern District of California:

Respondent hereby designates and requests that the record on appeal in the above entitled action shall include:

1. The Libel.
2. Answer of respondent United States of America. [37]
3. The impleading petition.
4. The answer of the respondent-impleaded, the Arrow Stevedoring Company.

5. Reporter's transcript of testimony as taken Thursday, April 18, 1947, on behalf of the respondent United States of America, together with all exhibits not annexed to the pleadings.
6. The findings of fact and conclusions of law as submitted by the impleaded respondent Arrow Stevedoring Company and signed and filed by the Court.
7. Final Decree entered by the Court herein.
8. Notice of Appeal.
9. Petition for and Order allowing appeal.
10. Assignment of Error.
11. Citation on appeal.
12. Praecipe for Apostles on appeal.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant U. S. Attorney.
Proctors for Respondent,
United States of America.

[Endorsed]: Filed Dec. 31, 1947. [38]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Respondent United States of America hereby assigns as error in the proceedings, orders, decision and judgment of the District Court in the above entitled action, the following:

1. That the District Court erred in making and entering the findings of fact, conclusions of law, and

order for judgment in favor of impleaded respondent and against the respondent United States of America, made and entered in the above cause; [39]

2. That the District Court erred in failing and refusing to find that the impleaded respondent Arrow Stevedoring Company was negligent;

3. That the District Court erred in finding that the respondent United States of America was negligent;

4. That the District Court erred in finding and holding that the respondent United States of America was not entitled to indemnity from the impleaded respondent Arrow Stevedoring Company under its contract with that company;

5. That the District Court erred in holding that respondent United States of America was not entitled to indemnity from the impleaded respondent Arrow Stevedoring Company under general law.

Dated: Dec. 31, 1947.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant U. S. Attorney,
Proctors for Respondent,
United States of America.

[Endorsed]: Filed Dec. 31, 1947. [40]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 40 pages, numbered 1 to 40, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Edgar E. Reite, etc., Libellant, vs. United States of America, Respondent, and Arrow Stevedoring Company, a corporation, Respondent-Impleaded, No. 24608-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$13.20 and that the said amount has been charged against the United States of America. And I Further Certify that annexed hereto is the original Citation on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of March, A. D. 1948.

[Seal]

C. W. CALBREATH,

Clerk.

/s/ M. E. VAN BUREN,

Deputy Clerk. [41]

[Title of District Court and Cause.]

CITATION ON APPEAL

To Arrow Stevedoring Company, a corporation, the
above named respondent-impleaded, and to
Messrs. John H. Black and Edward R. Kay,
its proctors:

Whereas, the United States of America, respondent above, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the entry of a decree denying recovery as prayed for in respondent's impleading petition, which said decree was entered on August 19, 1947, in the District Court of the United States for the Northern District of California;

You are, therefore, hereby cited to appear before the said United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, at the next term of said Court thirty days after the date of this citation, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the City and County of San Francisco, State of California, in the Ninth Circuit, on the 14th day of November, 1947.

/s/ LOUIS GOODMAN,

U. S. District Judge.

[Endorsed]: Filed Nov. 14, 1947. [43]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 24,608-G—In Admiralty

EDGAR E. REITE, as Personal Representative
and Administrator of the Estate of JOHN
HENRY MITCHELL,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent,

and

ARROW STEVEDORING COMPANY, a Corpo-
ration,

Respondent-Impleaded.

Before: Hon. Michael J. Roche and
Hon. Louis E. Goodman, Judges.

TRANSCRIPT OF PROCEEDINGS

Thursday, April 18, 1947

Counsel Appearing:

For Libelant: Herbert Resner, Esq.

For Impleaded Respondent, Arrow Stevedoring
Company, John H. Black, Esq., and Edward R.
Kay, Esq.

For the United States of America: William E.
Licking, Esq., Assistant United States Attorney.

CLAUDE BOWERS

was called as a witness on behalf of the defendant,
United States of America, and being first duly
sworn, testified as follows:

(Testimony of Claude Bowers.)

Direct Examination

By Mr. Licking:

Q. Mr. Bowers, referring to a date about May 28, 1945, at that time were you employed by the Arrow Stevedoring Company? A. I was.

Q. In what capacity? A. Walking boss.

Q. Do you recall being employed on a vessel about that time on which an accident happened in which one stevedore was killed and others injured due to the falling of a hatch? A. I do.

Q. Was that about the date I mentioned, May 28, 1945? A. It was.

Q. You heretofore testified in the other action that you have heard the Court and counsel discussing? A. Yes.

Mr. Resner: If your Honor please, may the witness be instructed to speak louder so I can hear?

The Court: Speak up.

Q. (By Mr. Licking): In what capacity were you employed by the Arrow Stevedoring Company on the vessel where the accident [2*] happened at this time? A. Walking boss.

Q. As walking boss, what were your duties?

A. I had charge of the stevedoring operations of the ship.

Q. What shift were you on? A. Night.

Q. What time does that shift go off duty, the men on the shift, do you recall?

A. In the evening.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

(Testimony of Claude Bowers.)

Q. In the evening or the morning? Do they go on in the evening?

A. They go on in the evening at 7:00 and come off at 6:00 in the morning.

Q. Are you required by your duties to be on the ship before your gang or remain after your gang leaves?

A. We are required to be there before and after they leave the boat.

Q. State whether or not part of your duties as gang foreman or stevedore foreman—what did you say your capacity was? A. Walking boss.

Q. State whether or not part of your duties as walking boss include remaining there to communicate the condition of the ship and gear to the man taking your position on the next shift.

A. We do.

Mr. Kay: I object to that on the ground no proper foundation has been laid. It would be calling for the opinion and [3] conclusion of the witness. There is no showing as to whether there were any duties, and if they were, they were not in writing. There is no proper foundation for that at all. If he asks what he did do——

Mr. Licking: I do not understand the objection. The objection that a foundation is not laid is an objection addressed to the introduction of a conversation or some such matter. Whether or not this witness as the stevedore walking boss in charge of the stevedoring of a vessel, and employed by the Arrow Stevedoring Company, is competent to state

(Testimony of Claude Bowers.)

what his duties were is a matter for the Court to answer. If the Court consider he is not competent to state what his duties were, the objection would go to the competence of the testimony.

Mr. Kay: Is that what you asked him, what his duties were:

Mr. Licking: I did, and that is what the objection was to.

Mr. Kay: It wasn't asked in that manner.

The Court: Read the last question.

(Question read.)

Mr. Kay: Furthermore, your Honor, on the ground it is leading and suggestive. That won't help me now.

The Court: Why don't you ask him what his duties were and let us proceed.

Mr. Licking: Very well.

Q. As walking boss for the stevedore gang, what were your duties? [4]

A. To supervise the unloading operations.

Q. Did that include the supervision of all the stevedores working on the vessel for the Arrow Stevedoring Company for your shift?

A. Yes, sir.

Q. Is the organization of the two shifts the same, that is, the organization of the day and night shift?

A. The organization is the same, but not always the operation.

Q. The organization is the same; that is, there is a man on the day shift who occupies the same position you occupy?

(Testimony of Claude Bowers.)

A. The same position.

Q. Can you state now whether part of your duties include remaining on board the vessel after your shift goes off? A. Yes, we do.

Q. Can you state whether or not part of your duties requires communication by you of the condition of the ship's gear to the men who take your position on the succeeding shift? A. It is.

Q. On this particular instance, with regard to the accident, you recall the place where the accident subsequently happened? A. Yes, I do.

Q. How would you describe that on a ship briefly? A. How it happened?

Q. No, what was the place; how would you name the place where it happened? [5]

A. The hatch, you mean?

Q. Yes.

Mr. Kay: Your Honor, there is no foundation laid as to time and place. This witness testified before he was not there at the time of the accident. I do not know when he came on afterwards. Conditions had changed then, and it is obviously improper to ask that question in that form.

The Court: I shall have to ask a question or two to get myself in the same position that Judge Roche is in. This witness was on a shift that came on after or before?

Mr. Kay: This witness was the walking boss on the shift that was on the vessel before the shift on which the accident happened.

The Court: He went off the shift before the accident happened?

(Testimony of Claude Bowers.)

Mr. Kay: He went off the shift before the accident happened. He has testified that it was part of his duties to remain after his shift went off.

The Court: Ask him what he did in this particular case. That is what we want to know.

Mr. Licking: I would like to ask him the question I did ask him, your Honor.

Q. The place where your gang was working immediately before they went off, what hold of the ship was it? A. No. 4 hold. [6]

Q. On what deck? A. The lower hold.

Q. As I understand it, there are two hatch covers to that particular hold at that level?

A. Yes.

Q. They open inboard? A. Inboard.

Q. Can you state whether or not on the 28th, on the night shift, the stevedore gang over which you had supervision, did or did not open that hatch?

A. We did.

Q. You did open the hatch. Had you been working above the hatch prior to that time?

A. Yes.

Q. About what time did you come down to the hatch?

A. Well, shortly after we came back from lunch that night. I would say around 1:30 in the morning.

Q. When you opened the hatch did you observe anything unusual about the condition of the hatch or the covers?

A. After we looked at the covers, and we saw what the situation was there, the shape of the hatch——

(Testimony of Claude Bowers.)

Q. What did you see?

A. Well, we say that the hooks wasn't in a proper condition. One was sprung. Had a hard time getting it over the top, but we finally made it. [7]

Q. Hook or hooks?

A. The hooks. There is two of them.

Q. Those hooks drop over the edge of the raised hatch and hold it in place?

A. To hold it in place, yes.

Q. Do you recall whether or not those hooks are equipped or supposed to be equipped with a pin to hold them in place?

A. They are, yes.

Q. You say that you succeeded in fixing both of them over the edge of the raised hatch. On which side was it that you had the difficulty, do you recall?

A. On the port side.

Q. Do you recall whether or not the pins intended to secure those dogs in place after the hatch is raised and they are placed to hold it were there or not?

Mr. Kay: What time?

Mr. Licking: At that time when they secured it.

The Witness: No, only one of them was there. And it was bent.

Q. (By Mr. Licking): And the other one was missing?

A. One was disappeared altogether.

Q. One had disappeared and one was bent. Was the condition of the bent one such that you could not use it, that is, that you could not put the pin in the hole?

A. Just part way. [8]

(Testimony of Claude Bowers.)

Q. Then the device to hold the hatch up was, in the respect you testified, defective; that is, the pins were not there to hold the doors in place, one of the pins wasn't there and the other pin you could not use, is that right?

Mr. Kay: I object to the question on the ground it is complex and calling for the opinion and conclusion of the witness. Mr. Licking says, "In other words, it is defective." Whether it appeared defective to him or not is going to be one of the issues.

Mr. Licking: All right. I will ask him that:

Q. At that time did it appear to you to be defective?

Mr. Kay: The word "defective" is what I object to, your Honor. He can merely describe what it is, and that is for the Court to determine.

Q. (By Mr. Licking): What effect would the fact that the pins were not in have upon the operation of the dogs?

Mr. Kay: Just a moment, your Honor. That is calling for the opinion and conclusion of the witness. If he could not put it on there, he would not know what the effect would be if it was on.

Q. (By Mr. Licking): How long have you been a stevedore? A. Approximately 25 years.

Q. Have you ever seen fastenings of this nature before? A. I have.

Q. Do you know how they work? [9]

A. I do.

Q. Basing your answer on your 25 years' experience and your knowledge of this type of fastening, can you state what the effect of these pins being

(Testimony of Claude Bowers.)

missing would be on the operation of the dogs in holding this lid or hatch cover up?

A. Well, that is a matter of difference. I couldn't say accurately.

Q. You couldn't say accurately?

A. They hold them up.

Q. Can you state whether or not without the pins in there the dogs can come loose through motion of the ship or cargo gear?

Mr. Kay: I object to that on the ground it is incompetent, irrelevant and immaterial. The witness has testified he could not say. Now he is, in fact, cross-examining his own witness.

The Court: Isn't this the testimony that was adduced before Judge Roche?

Mr. Licking: This is the testimony which counsel has characterized before the Court, and I thought the Court might have had the same impression of the evidence that counsel had, and I wanted to check over it.

Mr. Kay: I object further on the ground it has been asked and answered. He says he does not know what the effect would be.

Mr. Licking: He has answered that. He said it would depend upon what happened. [10]

The Court: Are you going to open now with this witness the testimony he gave before Judge Roche?

Mr. Licking: No, I am only going over certain points in the testimony that at that time were apparently not stressed sufficiently to impress them upon the Court or counsel's mind. I intend to prove

(Testimony of Claude Bowers.)

by this witness—I thought I had before—that he noted this defect at the time his gang fastened the hatch up.

The Court: You said that he noted the defect and he reported it to the Navy.

Mr. Licking: No, I did not say he reported it to the Navy.

The Court: Somebody did.

Mr. Licking: That is just the point I had in mind. Somebody else said it, and I want the evidence here so that we are not in doubt as to who testified to what.

(The last question was read.)

Mr. Kay: Your Honor, that is highly conjectural. The witness has testified he would not know the effect. It has been asked and answered.

Mr. Licking: He has not testified anything to that effect. It is proper, particularly in view of what happened.

The Court: Overruled.

Mr. Licking: May I have the question read again?

(Question reread.)

A. Well, that all depends on if anything strikes them or not. [11] I have seen several ships without any pins at all in them and it never hurt them.

Q. (By Mr. Licking): You say it depends on whether something strikes them or not?

A. It depends on whether something strikes them.

(Testimony of Claude Bowers.)

Q. After raising this particular hatch cover, you say at the same time raised the other cover. Did the gang go to work there moving other cargo?

A. In the other hatch, yes.

Q. The other hatch. They did not work under this port hatch? A. No.

Q. They continued to work and take cargo out from under the other hatch? A. We did.

Q. What reason, if any——

The Court: Is there a transcript of the testimony in the other case available?

(A transcript was handed to the Court.)

Mr. Resner: It is indexed.

Q. (By Mr. Licking): What was your reason, if any, for not working your gang under the port hatch cover after you raised it?

A. On account of the unsafe condition in the first place. The gear was not trimmed right to work in that hatch.

Q. When you speak of the gear, to what do you refer? [12]

A. The overhead gear, the falls.

Q. Were the same falls and booms used to unload both sides of this hatch? A. Both sides, yes.

Q. The same one? A. The same one.

Q. And it was improperly rigged for the port side? A. It was.

Q. At the time when you opened the hatch, was there any Navy personnel there helping you?

A. No.

(Testimony of Claude Bowers.)

Q. Will you state whether or not you reported the condition that you found, or any of it, to the ship's officers or to any of them?

A. I did, yes.

Q. What did you report, if you recall, and to whom?

A. To the lieutenant in charge of the ship at that time.

Q. What did you report to him?

A. We reported to him we would be ready to go to work in that hatch there, for him to get the gear ready.

Q. To get the gear ready?

A. And rig it for us. When we got ready to go to work, we found it hadn't been rigged yet. He said he had no men on board the ship that could do it at that time.

Q. What time was this when you spoke to the lieutenant? [13]

A. Around 1:30 in the morning.

Q. He said he had no men to fix the gear at that time. When you speak of the gear, are you referring to these holding devices and the pin or to the unloading gear to which you referred?

A. I am referring to the unloading gear.

Q. To the sling and falls?

A. Sling and the falls, and, well, it will take in the tanks, too. It would take in the tanks.

Q. Are you quite certain that at that time you did not report to the lieutenant that this pin was missing out of the dog?

(Testimony of Claude Bowers.)

A. I told him the dog—I didn't say anything about the pin—I told him the pins was bent and wouldn't go in.

Q. You told him the pins were bent and would not go in the dog. What did he say?

A. He said he would fix it in the morning or have it fixed.

Q. Did he say what time?

A. No, he didn't say what time, as soon as he had the men available.

Q. You continued to work on the other side but did not work on the port side when you found that condition? A. That is right.

Q. Your men worked until what time?

A. Until 6:00 o'clock.

Q. And then left the ship? [14] A. Yes.

Q. Were you on the ship when the next gang, the morning gang, came on on the 28th?

A. I was.

Q. By the way, who was the man on that gang who held the same position you held on the night shift? A. Michael O'Shea.

Q. At that time did you report to O'Shea the condition which you had found in the hold?

A. I did.

Q. Did you report to him that the holding devices were defective as you testified here, that is, that this pin was missing?

A. I told him that the pin was sprung on the top, and they would have to see the Navy to get that fixed before they started operating in that hatch.

(Testimony of Claude Bowers.)

Q. You are quite certain you told him that?

A. Yes, sir.

Q. How soon was that before his gang went to work?

A. That happened about twenty minutes after six, I guess, on that hatch.

Q. That was about 20 minutes after six.

I think I have no further questions of the witness.

Cross-Examination

By Mr. Kay:

Q. Mr. Bowers, you remember when you testified here at the last trial, don't you? [15]

A. I do.

Q. You told the Court the facts as you remembered them at that time, didn't you? The facts that you testified in the last trial here were the facts that you had in mind at that time, is that right?

A. I answered the questions to the best of my ability.

Q. Yes, and you told the truth then, didn't you?

A. I certainly did. I tried my best, anyway.

Q. As a matter of fact, you considered that hatch door safe as it was there? You did not find anything that would indicate to you that it was unsafe when you went on there?

A. I certainly did.

Q. You did?

A. The hook was sprung. We had an awful job to get it over the hatch.

Q. You are kind of mixed up on your facts in this case, aren't you? A. No, I am not.

Q. You never at any time considered that that hatch door, as it was up there, the way you say you lifted it, was safe? You never did consider that it was safe, is that right? You thought it was unsafe all the time? A. I didn't say it was unsafe.

Mr. Licking: Counsel objected continually to my questioning the witness as to his conclusions and opinions, and he has [16] asked for nothing else. I haven't objected but I do now.

Q. (By Mr. Kay): You did make the statement that this hatch on the port side was to all appearances, so far as you were concerned, safe, isn't that correct?

Mr. Licking: I object, if the Court please, if it is proposed to cross-examine the witness with reference to the transcript of his testimony at the former trial. The witness should be shown the transcript rather than having it paraphrased.

Mr. Kay: Very well, we will do that.

Q. I will refer you to page 223 of the transcript of the testimony of the previous trial. Just read this to yourself, line 13 through to line 17.

(The witness read the page of transcript indicated.)

Q. (By Mr. Kay): Have you read it, Mr. Bowers? A. I have.

Q. I will read that to you:

“A. I said the door was safe, but the gear was not safe.

(Testimony of Claude Bowers.)

“Q. That is all you mean?

“A. Yes.

“Q. The door was safe?

“A. The door was safe, yes.

“Q. So far as you could observe, when that door was put up there, it was safe?

“A. It was safe. It looked safe.”

Q. You so testified at the last trial, didn't you?

A. I did.

Q. Is that right?

A. It looked safe from the top. That is when you asked me if I looked down from the top, not from the bottom.

Q. I will not let you look back on this again and see where you can find in that question and anywhere preceding that part that I quoted, that I asked you if it looked safe from the top.

A. The same thing I said before. I did not consider it safe.

Q. This says you did consider it safe. You so testified the last time. Do you remember that?

Mr. Licking: I object to that.

The Witness: Under different circumstances.

Mr. Licking: Counsel, he just now said the same thing he said before: It was unsafe, or looked unsafe.

Mr. Kay: When did he testify it looked unsafe?

Mr. Licking: Just a moment ago. He said the same as he testified before. It looked unsafe.

Q. (By Mr. Kay): The fact is, Mr. Bowers, at the time you worked there that whole shift, so

(Testimony of Claude Bowers.)

far as the door itself, the hatch door itself was concerned, that looked safe to you, isn't that correct?

A. From outside appearance it would.

Q. And the time that you noted these conditions of the bent pins and so on, was after you quit your shift there?

A. No, they called my attention to it right away.

Q. You went to see the lieutenant about the rigging that you considered unsafe, isn't that right?

A. Well, the rigging—their job is the same thing, to lift the hatch.

Q. You went to the lieutenant on the ship to tell him about the rigging. Did you tell him also about the pin, and so forth?

A. I told him it was bent.

Q. You told him you were going to leave the hatch door in that condition until he fixed it?

A. I told him I would leave that hatch altogether and work on the other side.

Q. What did he say about that?

A. He said, "All right."

Q. He did not say when he was going to fix it, but he would get it fixed some time?

A. He would get it fixed as soon as he had the men available to fix it.

Q. The Navy did not give you or anyone representing the Navy instructions as to how to secure this hatch door, did they? A. No.

Q. This rigging is done by the Navy men? You never do any of that?

A. Not the overhead gear, no.

(Testimony of Claude Bowers.)

Q. You did not in this case?

A. We did not touch the overhead at all. [19]

The Court: It was the gear hitting the door that caused the door to fall, is that right? I did not hear the evidence in the case.

Mr. Licking: The door fell because the locking device which should be held by this pin let the door fall. The testimony is the door should not fall with the dogs over it.

The Court: The door fell without any contributing factor? It just dropped?

Mr. Licking: The door fell, the testimony in the record, as I recall it, is due to the vibration of the ship, the movement of the ship, moving the cargo gear or the possibility of the dog being struck by the cargo gear, the dog without the pin in it.

The Court: The gear hit the door—it seems somewhere or other someone mentioned that in the trial of this case.

Mr. Licking: Whether the gear hit the door or not, I would say, your Honor, is not clear from the record. You would agree to that, wouldn't you?

The Court: I do not say that it is.

Mr. Kay: I do not think there was any direct evidence, your Honor, on that.

Mr. Licking: The testimony was further—I think counsel will agree with me—the testimony was without the pin which goes through the dog to hold the dog in position, that the dog could work loose with the ship swaying or could be knocked [20] loose.

(Testimony of Claude Bowers.)

Q. (By Mr. Kay): The Navy lieutenant told you also when you went to see him there was no lashing or anything that you could use for tank tops, is that right, to lash this hatch?

A. He did not tell me a thing about the lashing.

Q. He told you there was no rope, lashing rope or cable?

A. We could see ourselves there wasn't anything there. There was nothing of that sort around, only junk.

Q. What time did you leave the ship the day of the accident? A. Shortly before 7:00 o'clock.

Q. You did not see any of the stevedores come on then, did you, of the next gang?

A. No. Some of them standing outside the gate but they didn't come inside.

Q. You did not talk to them? A. No.

Q. Unless you made a careful inspection of the top where these dogs came over and the pins are put into the dogs, you would not be able to tell from the deck nor from the next deck whether these dogs or pins were properly locked there?

Mr. Licking: I object to that on the ground it is argumentative, calling for the conclusion of the witness.

Mr. Kay: Well, again, he is your witness. You qualified him as an expert to be able to determine from observation these conditions and he has been on other ships with this same [21] kind of tank top.

Mr. Licking: If you ask him a direct question I probably won't object to it. That question is objectionable.

(Testimony of Claude Bowers.)

The Court: Can't you ask him a question, Would he be able to determine that?

Q. (By Mr. Kay): From standing on the next deck could you tell whether these dogs were properly locked and whether the pins were on?

A. Standing on the top deck, well, you could not, no.

Q. Standing on the bottom, on the same deck from which the door swings up, could you tell?

A. You could see from there, yes.

Q. That is ten feet high, isn't it?

A. It is ten feet, that is all.

Q. Does it come out over the edge, that is, the dog? A. The dog comes right over the edge.

Q. Where does the pin fit?

A. Right behind the hook.

Q. You would not be able to see the pin, would you? A. Yes, you can see the pin.

Q. How did you hook them on when you came on there?

A. What do you mean, hook what on?

Q. The dogs on these hatch doors. How did you hook the doors up there?

A. All they do is put the pin on the top there. They are [22] there all the time.

Q. You pull the door open with the ship's gear, don't you? A. Yes.

Q. And that puts it upright? A. Upright.

Q. That is ten feet above the deck, the top of it, the top surface?

A. Above that portion of the deck, yes.

(Testimony of Claude Bowers.)

Q. How are the hooks fastened on?

A. There is a stanchion there that comes out a short ways there. They hook onto that.

Q. Did you see that done? A. Yes.

Q. Do you know who in your gang did it?

A. I do.

Q. Who was it?

A. They are both in court now.

Q. How did they do it? From the deck?

A. From the deck.

Q. They could not reach ten feet?

A. One man lifted another man up and put him on top to reach.

Q. That was done on both sides in there?

A. Yes.

Q. And you were right there at the time?

A. I was. [23]

Mr. Licking: Counsel, may I interrupt just a moment?

Mr. Kay: Certainly.

Mr. Licking: Judge Roche is familiar with the locking device. There is an exhibit some place in the case that will show the locking device.

The Clerk: The exhibits are before the Circuit Court.

(Discussion between counsel as to diagrams of hooks.)

Q. (By Mr. Licking): Can you draw that hook out there so the Judge can see it? Assuming that this is the side view of that hatch door as it sits up

(Testimony of Claude Bowers.)

on deck, can you put the hook on there as it would be? Where is that locking pin?

A. It is in the rear here.

Q. Draw the other one right alongside there.

Mr. Kay: There is a pin on that side, is that right?

The Witness: This door does not lean that way.

Q. (By Mr. Kay): Don't the two doors open this way as we have them roughly drawn?

A. One of them falls at an angle, lays at an angle.

Q. Did the port one lay at an angle?

A. No, the starboard side. If we draw it over here, that would be more like it. It would be at an angle like that (indicating).

Q. This is the starboard that leaned in?

A. That is right.

Q. We have them backwards on this diagram. We will mark this [24] for identification. That is an awfully crude drawing, Judge.

The Court: This is the open hatch on this side?

Mr. Kay: That is right.

The Court: These are the two pins that hold the hooks?

The Witness: That hold the hooks.

Q. (By Mr. Kay): And those are on the inside between the two covers as they come up?

A. Yes, in one way they are between the two covers.

(Testimony of Claude Bowers.)

Q. It would be pretty difficult to see those pins when they are up between the two covers unless you got right up and looked at them?

A. If you got right in and looked at them.

(The drawing in question was thereupon marked Respondent Arrow Stevedoring Company Exhibit A for identification.)

Mr. Licking: Rather than have it marked for identification, I will offer it at this time.

Mr. Kay: We will offer it. It is just as well.

The Court: Mark it in evidence.

(The document referred to was thereupon received in evidence as Respondent Arrow Stevedoring Company's Exhibit A.)

Mr. Kay: If the Court please, I would like to have the witness refer to his testimony on page 220, starting with line 24 and to line 11 on page 221. Will you read that to yourself, please?

(The witness did as requested.) [25]

Q. (By Mr. Kay): At the time of the last trial, when you testified in connection with this matter, you testified as follows, did you not?

Mr. Licking: If the Court please, I object to a reading of the testimony. It is not based upon any question. He has not asked the witness for it. He has a right to read the testimony if it is impeaching and if he has asked the question, but he hasn't a right to ask the witness merely to read something and then proceed to read it aloud himself.

(Testimony of Claude Bowers.)

Mr. Kay: Very well, we will do it the other way, your Honor.

Q. The fact is, isn't it, that this hatch, the hooks and so on that go in there, appeared to you to be in a safe condition, that is, the port hatch, when you opened it?

Mr. Licking: To which I object on the ground it has already been asked and answered.

Mr. Kay: I noticed some other testimony here, your Honor. This is some other testimony. It is not what we refer to in the last question.

Mr. Licking: Is it prior or subsequent to that place you referred to in the other question?

The Court: It is answered over on the following page.

Mr. Kay: Up to line 12 on page 221, your Honor. I would like to ask it in the form I did before, your Honor, because it simply facilitates things here. It must be remembered Mr. [26] Licking is putting this man back on the stand, and I think, to keep the record straight in this case, we are perfectly justified in asking the question in this way.

Mr. Licking: The Court has the testimony before it, in any event. You are going over something that is before the Court. If you wish to, I will stipulate you may read all the examination.

Mr. Kay: I don't want to read all the examination. I have a purpose in reading it.

Mr. Licking: What is the question?

(Testimony of Claude Bowers.)

The Court: He asked him when he opened the doors did they appear to be in safe condition.

Mr. Kay: That is right, whether the port hatch appeared to be in a safe condition when you opened it.

The Witness: It appeared to be, until you looked at it, tried to get the hooks into it.

Q. (By Mr. Kay): It appeared all right to you, so that you left it in that condition so far as the door is concerned, is that right?

A. There was nothing we could do about the door.

Q. Well, but it appeared all right to you, didn't it?

A. From a casual look.

Q. You testified at the last trial as follows:

“Q. Did you notice at that time whether this appeared to you to be in safe condition, the port hatch, when you opened [27] it?

“A. It appeared all right, yes.

“Q. If it had not appeared all right, you certainly would not have left it in that condition. You were concerned with the safety of the men?

“A. We didn't leave it in that condition.

“Q. What did you do?

“A. We left it for the night crew to trim the gear so we could work in the hatch.

“Q. You say you did not leave it in that condition. What do you mean by that?

“A. The hatch was all right.

(Testimony of Claude Bowers.)

“Q. The hatch was all right when you left it, is that correct?

“A. Yes, absolutely.”

You so testified the last time, didn't you?

A. I said it looked all right.

Mr. Kay: That is all.

Mr. Resner: I was wondering whether I was in the case. Do you mind, Mr. Licking?

Mr. Licking: Not at all.

Cross-Examination

By Mr. Resner:

Q. Mr. Bowers, just so there will be a picture of how this happened, I have drawn a sketch. As I understand it, these tank tops fit on hinges at the bottom of the compartment [28] and lift up and come together inboard in just about the opposite way that a sidewalk elevator opening would open?

A. The same.

Q. The same construction, but whereas a sidewalk elevator opening comes out, these two come inboard, is that right? A. Yes.

Q. The way this ship is constructed the bulkheads extend far enough so that when these tank tops come up, they sort of lean back against the bulkheads? A. Yes.

Q. And at east end of the bulkhead, on both the forward and after end, are two hooks for each tank top, is that correct? A. Yes.

Q. As I understand it, the starboard tanktop or the one in which your gang worked the night before

(Testimony of Claude Bowers.)

the accident leaned back so that by gravity it would to some extent rest against this bulkhead protrusion, is that right? A. Yes.

Q. And then the hooks would come over on the starboard side and fit exactly over the tanktop so it would secure it and then the pin would go through those hooks on the starboard side, is that right?

A. Yes.

Q. And these hooks were about eight inches or so in length, is that correct, that went over the tanktop? [29]

A. I don't know exactly. They was in that neighborhood, though.

Q. And these pins, as I understand it, were on chains? A. Chains.

Q. And they were fastened to the bulkhead, and when they were out of place, they would hang loose on the chain? A. Yes.

Q. When you would put them through, they would still be hanging on the chain but the point would go through the flange and thus secure the hook? A. Yes.

Q. And that was the way it was on the starboard side, the good side? A. Yes.

Q. On the port side the tank top was almost perpendicular, that is, it was straight up and down so that there wasn't any gravity which would hold it in place? A. It was straight up.

Q. In other words, unless there was something to secure it, it would fall with any movement, is that right?

A. I don't know whether it would fall or not.

(Testimony of Claude Bowers.)

Q. In any event, let us put it this way: It was straight up and down?

A. It was straight up and down.

Q. As distinguished from the one on the star-board side. As I [30] understand it, the hook on the after part of the port tank top was bent, is that right.

A. I wouldn't say which one it was.

Q. One of the hooks was bent so that it would not fit over the tank top, but the edge of the hook would just rest at the edge of the tank top, is that correct?

A. It came down far enough to hold it.

Q. It came down, but the pin would not go in?

A. Not all the way.

Q. Not all the way, so there was no pin to secure it?

A. Not with a pin.

Q. The pin would not go through to secure it?

A. No.

Q. On the other hook on that port tank top, the pin was missing completely, is that right?

A. You are referring to two different tank tops.

Q. I am referring to the port tank top. There are two hooks on the port tank top; one was bent so it would not go all the way in through.

A. One was sprung.

Q. One was sprung, and the other had the pin missing?

A. They had only one missing. One was missing and one bent pin.

Q. That is what I am saying. One was bent and one was missing?

A. You couldn't get it all the way through. [31]

(Testimony of Claude Bowers.)

Q. Is that the true picture of what existed there?

A. Yes.

Q. As I understand it, in the middle of these tank tops there is a ring which you hook on to lift them up with the falls so you can lean them against the bulkhead before you fasten them?

A. Yes.

Q. It would have been possible to lash those two hooks together so the two tank tops would be lashed together?

A. Yes.

Q. But there wasn't any cable on the ship so that could not be done?

A. There was lots of junk around there but we had no access to it.

Q. The general rule is when you come aboard a ship the Navy is supposed to rig the gear; the stevedores are not supposed to touch it?

A. That is their job.

Q. That is their job, but with a casual look, this tank top, if you looked at it without examining it, it seemed to be all right?

A. If you just looked at it.

Q. If you just looked at it, it looked all right.

A. Yes.

Q. During the course of the operation you went to the Navy lieutenant in charge when you were about ready to discharge [32] these empty ammunition cases from the port side and told him you were ready to go to work on the port side and for him to lash the tops?

A. I told him to get the gear ready for us to go down there.

(Testimony of Claude Bowers.)

Q. And he said he did not have the gear?

A. He said he didn't have the men available.

Q. In any event, you knocked off at 6:00 o'clock?

A. That's it.

Q. Your men did not even go in the port side where this accident happened?

A. We didn't work in there at all.

Q. The next night, the night of the accident, you came back at 7:00 o'clock? A. Yes.

Q. You heard about the accident?

A. Heard about it.

Q. You saw now the two tank tops lashed together and the two rigs were held together by means of a cable? A. At night, yes.

Q. They lashed the tank tops, is that right?

A. Yes.

Q. They couldn't lash the tank tops before?

A. If they had the men, they could have.

Q. That was the Navy's job, wasn't it?

A. Yes, sir. We don't do that. [33]

Q. In other words, if they had good cable aboard, and they had been taking care of their job, they would have lashed those tank tops before this accident happened?

Mr. Licking: To which I object on the ground it is purely argumentative, has nothing to do with the direct testimony given by the witness, and is an interrogation on the field of the Navy's duty, to which the witness is not competent to testify.

The Court: You have brought out the fact.

Mr. Resner: I will pass that, then.

(Testimony of Claude Bowers.)

Q. In any event, when you came back that night after the accident in which Mr. Mitchell was killed and Mr. Williams who sits in court was hurt, you found one hook was sprung or bent as it had been the night before the pin was still missing; that part of the gear had not been fixed?

A. I seen the thing was lashed together with wire. That is as far as we went.

Q. You knew it was not fixed?

A. When we came back it was fixed, yes.

Q. It was lashed? A. It was lashed, yes.

Q. But the hooks and the bolts were not fixed?

A. With that wire we didn't even notice it, didn't pay any attention to it.

Q. What is that?

A. We came back to work the next night and we didn't bother [34] with the hooks that night.

Q. You knew they were not fixed?

A. We knew they were not in shape. I don't know whether they fixed them in the day.

Q. You gave me a statement in which you said they did not fix them.

A. Didn't fix the hooks?

Q. Yes, and the pin in the meantime.

A. No, I said they lashed them. I might have been mistaken. We didn't examine that close. They was over the top.

Q. You recall when I discussed this thing two or three times in great detail, Mr. Bowers?

A. Yes.

(Testimony of Claude Bowers.)

Q. You were trying to give us a correct picture of just what happened there. You recall the last statement when you came down to my office this month, just a few days ago?

Mr. Licking: Is the witness to be properly cross-examined with reference to written statements he is supposed to have given counsel?

Mr. Resner: I think this is proper.

The Court: I think it is perfectly proper. He made the statement.

Mr. Licking: Without my examining it?

Mr. Resner: You can come up and look at it. I will give you a copy of the statement and you can look at it. [35]

Mr. Licking: I would like to have a copy of the statement.

Mr. Resner: It is a little bit more, Mr. Licking, than I have been able to secure from the Government.

Mr. Licking: That is very nice of you, but the point I am suggesting, your Honor, is this: May counsel, by going outside the field of direct examination of the witness, create a field for cross-examination, which has been done here, and then after creating the field by questions outside the direct examination, proceed to impeach the witness in the field outside? That is just what has been done here.

Mr. Resner: I am only doing it for this reason, Judge, and I am concerned with the question of approximate cause, and I am presenting my case with that thought in mind.

(Testimony of Claude Bowers.)

Mr. Licking: If you are taking the witness for that purpose as your own rather than on the field of cross-examination, I have no objection to the witness testifying to anything, but this is not proper cross-examination.

Mr. Resner: I think so. He is your witness.

Mr. Licking: This has to do with the next day. This has to do with the condition that existed after the accident happened. It hasn't conceivably anything to do with the direct testimony given by the witness. I object on that ground.

The Court: When did this occur?

Mr. Resner: The following day, right after the accident.

The Court: What relation has that to the accident? [36]

Mr. Resner: It shows the liability of the Navy, and it shows their knowledge. It shows that they rigged the gear after the accident by lashing this defective tank top to the good tank top, and it shows that they did not fix the pin, and it merely, so far as I am concerned, proves definitely the unseaworthiness of the ship and the approximate cause of the accident in which Mr. Mitchell was killed.

The Court: I think we are agreed that we will allow the testimony.

Mr. Licking: I haven't any objection to the witness testifying to that, but I respectfully again call your attention to the fact that it is not in the field of cross-examination. It is twelve hours after

(Testimony of Claude Bowers.)

the accident and does not concern anything about which the witness has testified.

Q. (By Mr. Resner): Mr. Bowers, the fact is, according to this statement, they lashed it after the accident? A. They lashed it afterwards.

Q. But did not fix the hooks and pins?

A. I wouldn't go in there until it was fixed.

Q. As I understand it, you men would not go in afterwards until it was lashed? A. No.

Q. Because it was unsafe gear?

A. The way the gear was leaning—take the overhead—and they do that all at one time. But the main reason we didn't go in [37] the hatch was on account of the overhead, but that takes in the tank tops and all.

Q. Certainly the way you were pulling the cargo out with the falls, unless that tank top were lashed or secured it would be dangerous?

A. Either that would be dangerous, if the fall wasn't directly in the middle of the ship—then there is a possibility it would be all right—but the way the gear was laying there, you would knock everything down.

Q. Without it being secured by hooks and pins or being lashed? A. The gear the way it was.

Q. Is my statement right?

A. Yes, the way the gear was laying.

Q. There was a whole hour that elapsed between the time you left the ship and the starting of the day gang with which Mr. Mitchell was working when he got hurt?

(Testimony of Claude Bowers.)

Mr. Licking: I object to that as argumentative and a misstatement of the witness' testimony.

Mr. Resner: Is that right, Mr. Bowers?

Mr. Licking: That is a misstatement of the witness' testimony.

The Witness: Let him say the question again.

Q. (By Mr. Resner): You knocked off at 6:00 o'clock in the morning?

A. No, the gangs did. I stayed there until 7:00.

Q. The gang knocked off at 6:00 o'clock; the next gang came on at 7:00? A. 7:00.

Q. During that hour period no stevedores worked the ship?

A. No stevedores worked the ship.

Q. But the crew and the Navy officers were still aboard? A. Yes.

Mr. Resner: That is all.

Redirect Examination

By Mr. Licking:

Q. During that period of time were the Navy crew or the Navy officers or any of them in this hold? A. I don't know.

Mr. Kay: Just a moment. I object to that on the ground no proper foundation has been laid. This witness is not shown to have sat there or remained in this hatch for an hour.

Mr. Licking: What is this business of foundation? I asked a question. Read the question, Mr. Reporter.

(Question read.)

(Testimony of Claude Bowers.)

Mr. Kay: Your Honor, there is no foundation laid there. How do we know he was there? He does not sit there for an hour to see if the Navy crew come there.

The Court: The answer is innocuous. He says he doesn't know.

Mr. Licking: I thought he said, "No," your Honor.

The Court: He said he didn't know. [39]

Mr. Kay: I will withdraw the objection.

Q. (By Mr. Licking): At the time the crew under your direction raised this hatch cover, the condition of the hatch cover and the condition of the gear, as I understand your testimony, made that portion of the hatch unsafe to work?

A. Yes, sir. We didn't work the hatch.

Q. That is the reason you did not work the hatch. Will you state whether or not in your opinion at that time it was unsafe to work?

Mr. Resner: We can stipulate to that now, I think.

Q. (By Mr. Licking): Do you understand my question?

Mr. Kay: We will object to that as calling for the——

Mr. Licking: We have one counsel objecting and the other counsel stipulating.

Mr. Kay: I object to that, if your Honor please, on the ground that that is the very thing the Court has to determine. That is asking the witness to give an opinion on the very issue that the Court must determine.

(Testimony of Claude Bowers.)

Mr. Licking: I asked the witness to give an opinion on whether or not a condition is safe for work which he has testified he has had 20 years of experience on, and which he at that time was in the official position of supervising for the defendant the Arrow Stevedoring Company, the impleaded respondent. I think the question is perfectly proper.

The Court: I must confess I do not know what you are [40] getting at there. What was unsafe?

Mr. Licking: I asked him if the number 9 hatch——

Mr. Resner: No. 4, Mr. Licking.

Mr. Licking: I asked him if the No. 4 hatch, where this cover was lifted, and the accident afterward occurred, was, at the time he raised it, unsafe in his opinion.

The Court: Well, if it fell down obviously it was not safe.

Mr. Kay: I know what Mr. Licking is getting at. He wants to show knowledge on the part of this stevedoring boss that he at that time thought it was safe or unsafe.

Mr. Licking: Why can't I show it? That is what I want to show.

Mr. Kay: Very well. On my cross-examination I believe I have shown that he thought it was perfectly safe.

The Court: Judge Roche and I will have to weigh that testimony.

Mr. Licking: You and Judge Roche may have to weigh it, your Honor, but I submit that I am

(Testimony of Claude Bowers.)

entitled to ask this witness if in his opinion the hold under this port hatch was a safe place to work after it was raised and secured as he has described it there. That is the question I asked him and I think I am entitled to an answer to the question, if in his opinion it was safe at that time to work.

Mr. Kay: He is going back on direct examination, your Honor, [41] and asking this witness——

Judge Goodman: So far as I am concerned, let him answer the question.

Judge Roche: He may answer.

Q. (By Mr. Licking): Do you understand the question? A. What is the question?

The Court: I suggest that you reframe the question and ask it directly.

Q. (By Mr. Licking): Why didn't you work the port hatch of No. 4 that night after you raised it?

A. The condition of the gear, the way the gear was sitting, the overhead gear.

Q. The condition of the overhead gear?

A. The condition of the overhead gear, yes.

Q. Did the condition of these devices to hold the hatch cover up have anything to do with your decision not to work it?

A. Well, they would not, to a certain extent.

Q. I am just asking you if they did or did not; did you consider that factor in the case?

A. The only thing I took into consideration at that time was the overhead. That is the first thing you consider in an operation of that kind.

(Testimony of Claude Bowers.)

Q. (By the Court): Will you answer this question: Did you quit work there because of the pin?

A. No, I quit work on account of the overhead gear. [42]

Q. That is what caused you to quit work?

A. That is what caused me to quit work.

Q. (By Mr. Licking): When you reported the condition to O'Shea, the next man on the job, who took over after you, did you mention to O'Shea the pins as well as the gear?

A. I told him one of them was sprung. He couldn't get it in place properly.

Q. Did you tell him the other one was missing?

A. Yes.

Q. You said this, from a casual glance, looked all right. By that do you mean these locking devices and pins looked all right at a casual glance?

A. Yes, if you were on top of the hatch they would look all right.

Q. How long did you say you had been a stevedore? A. Approximately 25 years.

Q. Were you walking boss before you were a foreman? A. No, that is all the same job.

Q. Who has immediate charge of the gang working the hatch? A. The gang boss.

Q. Who was the gang boss on the shift next?

A. I don't recall his name. I don't know his name.

Q. Who was the gang boss on the next shift, the gang boss when the accident occurred? Was it a man by the name of Larsen?

(Testimony of Claude Bowers.)

A. Yes, Larsen was his name. [43]

Q. Have you held that position? Are you familiar with the duties of that position also?

Mr. Resner: I submit, your Honor, that is irrelevant.

Mr. Licking: Do you think it is?

Mr. Resner: Certainly.

Mr. Licking: I will take a ruling on the question on its relevance, the duties of the man who has immediate charge. The record will show that Larsen testified that he himself did not go down into the hold, that he merely looked down from the top before sending his man down.

The Court: Who was Larsen? The other boss?

Mr. Licking: Larsen was the other foreman.

Mr. Resner: Larsen was the gang boss. This gentleman was the walking boss in charge of more than one gang. The gang boss in in charge of one gang.

Q. (By Mr. Licking): I asked you if you had ever been gang boss before you became walking boss, not on this particular job, but on other jobs.

A. On other jobs I have some, yes.

Q. Are you familiar with those duties also?

A. Yes.

Q. Familiar with what proper stevedoring practice in that respect is? A. Yes, sir.

Q. Can you state whether or not before sending the crew down [44] in the hatch it is or is not proper practice for the man who has charge of them to

(Testimony of Claude Bowers.)

examine the gear and also the devices, such as these hatch covers and the devices to hold them in place?

Mr. Resner: I submit, if your Honor please, that that is irrelevant and incompetent to the issue here involved. The only question, as I see, is the unseaworthiness of the vessel and the approximate cause.

Mr. Licking: He has testified that at a casual glance from the top this looked all right. Larsen says that is all he gave it, was a casual glance from the top, and I want to know if Larsen fulfilled his duties in taking a casual glance from the top before going down into the hold.

Mr. Resner: This is not the witness of whom to ask that question.

Mr. Licking: Shall I ask Larsen if he properly performed his duties?

Mr. Resner: If your Honor please, the proper way to ask that question is of an expert in the stevedore business—not that Mr. Bowers does not know his work. He had a lot of experience. But he was a walking boss and not a person who would make the determination of what the gang boss of any particular gang should or should not do.

Mr. Licking: He had been a gang boss. He said he was familiar with the practice in that respect, and I submit he is qualified by 25 years of experience to answer the question. [45]

The Court: Let the witness answer the question.

The Witness: If I was running the gang, I would have been down there when they changed over. That is the only opinion I can give.

(Testimony of Claude Bowers.)

Q. (By Mr. Licking): Do you think it is proper practice before sending the gang down to satisfy yourself from the top of the hatch as to conditions below? A. No, I do not.

Mr. Resner: I object to that as a conclusion of the witness.

Mr. Kay: I ask that the answer be stricken.

The Court: What do you mean by a glance from above?

Mr. Licking: Well, just an inspection from above. Larsen has already testified that he did not go down. That is in the record.

The Court: He made his inspection from the top?

Mr. Licking: He looked from the top and it looked all right from the top. This witness has said it looked all right from the top. I want to know if the man in charge of the men going down there has properly discharged his duty by just looking from the top, or if he should go down and see what conditions are before he puts his men to work.

Mr. Resner: I object to that on the ground it is not within the issues of the case. What has that got to do with approximate cause and the unseaworthiness of the ship? [46]

Mr. Licking: The whole thing is this: Counsel seems to regard that—I do not think so—unseaworthiness of a ship is something that works by itself.

The Court: There is merit in my opinion to Mr. Resner's objection because how are you going to tell what the extent of the contribution is? A man

(Testimony of Claude Bowers.)

might not have performed his duty in precisely doing everything some stevedore would do, but would that make the stevedoring company the sole proximate agency, put upon its shoulder the sole proximate blame for the accident?

Mr. Licking: I am not necessarily limiting the case to proving sole proximate cause on the part of the stevedoring company, but certainly it goes to show that what their agents did was a contributing factor. The libelant is not cross-respondent here. The workmen are not the cross-respondent. The Arrow Stevedoring Company is. I am entitled to show whether or not the Arrow Stevedoring Company's walking bosses discharged their duty, but whether Larsen, the man in charge of this particular gang, discharged his duty, whether he did properly stevedore the ship.

Mr. Kay: That is a pretty broad thing here, your Honor. We have one walking boss here that might have done something in detail and another one that may have made the inspection that was proper, and I think it is putting this witness in the position of being an expert for which he is not really qualified in [47] that regard. He is not a safety engineer. He is not the officer or agent of the stevedoring company with respect to certain duties that they are required to do. I think that is getting pretty far afield here.

Mr. Resner: You run into the whole question of what duties are imposed upon stevedores by way of inspecting gear.

(Testimony of Claude Bowers.)

The Court: He might have inspected from the top and under certain conditions an inspection from the top might have been sufficient. That opens up a pretty big field, doesn't it?

Mr. Licking: I understood the witness to say it looked safe from the top, but from the bottom it could be observed it was not safe. That is, the pins were not in there.

Q. Was that your testimony? A. It was.

Mr. Kay: He did not so testify, your Honor. He said from the bottom he could see whether the pins were in. This question is whether he thought it was unsafe or not.

Mr. Licking: I did not ask that question.

Mr. Kay: You used the word "safe."

Mr. Licking: Not now I didn't use it. I just asked if it was proper practice for the man directly in charge of the gang who went into the hatch to go into the hatch to make an inspection to see what conditions were before he put his men in there.

Mr. Kay: I object to that on the ground no proper [48] foundation has been laid, incompetent, irrelevant and immaterial.

Mr. Licking: Well, if after 25 years' work and having held the same position himself——

The Court: Let him answer.

Q. (By Mr. Licking): Do you understand the question?

A. That all depends on the situation.

Q. Well, in this particular situation that there was there.

(Testimony of Claude Bowers.)

Mr. Kay: Just a minute.

Mr. Licking: The particular situation that was there when you left the job with the hatch in that shape.

The Court: The difficulty is you did not permit the witness to conclude his answer.

(Question and answer read.)

The Witness: That all depends on the situation. This man might have been busy on deck at the time those fellows were there, and if anything was wrong, somebody would notify him below. It is a long ways down there. It takes you five minutes to get down to the bottom of that ship. You could only see the square of the hatch here.

Q. You mean in any other ship you could see the whole operation from the top?

A. It wasn't so high. There was so much space between the cargo and the top of the hatch.

Q. On this particular ship you could not see the condition of [49] the gear and the hatch covers down below from the top, do you mean?

A. You could see it from the top. It appears from the top it would look all right. It is like an elevator shaft, and you couldn't see if there was anything wrong or not from the top.

Q. I asked you if under those circumstances it was or was not proper practice for the man in charge of them to make an inspection down there before he sent them down to work.

(Testimony of Claude Bowers.)

Mr. Resner: If your Honor please, I object to that on the ground that calls for a conclusion, and that is one of the questions before this Court. Circumstances vary according to the particular case. Mr. Licking is asking the witness for an opinion on a question of law.

Mr. Licking: I do not think it is a question of law. It is a question of proper practice in his own trade.

The Witness: It is too broad there. I couldn't say that. Where one man would another man would not. He would be right whichever way he did it, in a situation the way that ship is laid out there, because it was about five to eight—well, I would say a man of his age it would take more than five minutes for him to climb down there. I would say he *could* down there in a half hour after he got things started on the deck. That is where you usually start, on the deck of the ship. By the time he got down there to where the cargo was, through all the quarters, it would take quite a while to get there. [50]

The Court: Are we going to conclude with this witness?

Mr. Licking: That is all. I have no further questions of this witness.

The Court: Is that all of the witness?

Mr. Kay: That is all.

KASIMER ANZULOVICH

was called as a witness on behalf of the United States, and being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the Court? A. Kasimer Anzulovich.

Direct Examination

By Mr. Licking:

Q. Mr. Anzulovich, are you a stevedore?

A. Yes, sir.

Q. Do you know the gentleman who was just on the stand? A. Yes, sir.

Q. Do you recall an occasion some time about May 28th of last year?

A. Well, I remember things.

Q. Do you remember the thing?

A. I remember how it was but I never saw the accident.

Q. You never saw the accident? A. No, sir.

Q. The accident occurred on the day shift and you worked on the night shift? [51]

A. That is right.

Q. When you worked on that night shift, what work were you doing on the ship yourself?

A. We were discharging, I don't know, it was kind of shell empties.

Q. During the course of your work on the night shift, did you finish up on one deck and have occasion to open the tank doors, below?

A. Yes, we went to open the tank doors.

(Testimony of Kasimer Anzulovich.)

Q. What time was that?

A. I can't remember because I was so new at that time I didn't pay no attention.

Q. You didn't pay any attention?

A. I don't remember.

Q. You do remember you unloaded the cargo, you came down on your night shift and opened the doors?

A. That is right.

Q. Who opened the doors? Your stevedore gang?

A. Our gang did, yes.

Q. Did the Navy have anything to do with the doors?

A. I didn't see no Navy.

Q. When the doors were opened, did you notice anything about the fastening of the doors that was different than usual?

Mr. Kay: Just a minute, again, your Honor. That is leading. You can ask the witness what he saw, but Mr. Licking [52] continuously assumes and puts in his question some suggestion as to what the witness knows.

Mr. Licking: I asked him if he observed anything out of the ordinary in connection with the fastenings of the doors.

Q. (By the Court): Was the door fastened?

A. In my opinion——

Q. No, no. How was it fastened?

A. I saw just two loose hooks on top—that is all I saw. I didn't see no pins of no kind. Just got the hooks on top of it.

Q. (By Mr. Licking): You saw no pins?

A. I didn't see no pin.

(Testimony of Kasimer Anzulovich.)

Q. Did you work under it afterward?

A. I told you, your Honor, I was new. I had my partner, an old stevedore, a walking boss and the gang boss wanted us to use scows about 8 foot by 5 foot to go down there. My partner went upstairs and looked for the foreman and told him he wants nets to put that stuff in there. That is safer. So we used the nets after that. But the walking boss found out about the gear on that side, the port side—whatever he said; I didn't understand what it is then—and then we walked to the other place and we used the nets.

Q. Did you work at all on the cargo on the port side? A. We didn't work at all on that side.

Q. You did not work at all on that side? [53]

A. No.

Q. But you do know the stevedore gang raised the hatch? A. Yes, sir.

Q. Who hooked it up, do you recall that?

A. What?

Q. Do you recall who on the job put the hooks on there?

A. I don't know. Some of us. I don't know which, but just raised it up and put those hooks on it. That is about all there is to it. There was no pins of no kind.

Q. There weren't any pins, did you say?

A. No, when we came the next evening we find that thing is strapped together. If they done that before, there would be no accident at all.

(Testimony of Kasimer Anzulovich.)

Q. When you say if they had done that before—

A. I don't know who was supposed to do it. If I was a foreman I would do it myself, even if the Navy wasn't there, for safety first.

Q. Did you notice whether or not the pins were there on these locking devices?

A. I never noticed the pins at all. If I remember, we got up and put those hooks down like that. I thought the things were standing like that, and I thought it was safe by itself. It was heavy doors and I never thought that darn thing would go down.

Q. Do you yourself have anything to do with fastening the [54] hooks? A. No, sir.

Q. You did not?

A. No, sir. Just helped one fellow go up a little bit and I seen him drop the hook down.

Q. You helped one fellow go up a little bit?

A. Yes.

Q. How do you mean you helped him go up a little bit? You lifted him up?

A. Lifted him up. It was kind of high.

Q. Do you remember who it was you lifted up?

A. I don't know. Some fellow.

Q. You don't know who it was?

A. Some stevedore that was in our gang. I can't remember. I was green at that time, still green.

Q. You say you did no work at all on the port side of that hatch? A. No.

Q. Was the door or cover to the port side of the hatch still up when you left the ship?

A. Both doors were standing like that together when we left the ship.

(Testimony of Kasimer Anzulovich.)

Q. When you left the ship? A. Yes.

Q. The same way as when you opened it? [55]

A. Same way.

Q. Was any Navy personnel in and about there when you were working there?

A. I don't remember seeing nobody down there.

Q. Do you not remember seeing any naval personnel down there? A. No, sir.

Mr. Kay: No questions.

Mr. Resner: No questions.

JOSEPH KOKICKS

was called as a witness on behalf of the defendant, United States of America, and being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the Court? A. Joseph Kokicks.

Direct Examination

By Mr. Licking:

Q. Mr. Kokicks, you are a stevedore by occupation? A. Yes, sir.

Q. Do you know Mr. Bowers, who testified a while back? A. Yes, I know him.

Q. Were you working on that same ship on May 28, 1945? A. I was right down below.

Q. You were right down below? A. Yes.

Q. You were on the gang that worked the No. 4 hatch? A. Yes.

(Testimony of Joseph Kokicks.)

Q. That night. Do you recall whether or not you had occasion to lift the tank covers on the night shift?

A. Yes, I was going to do it myself. All the rest of them, and I was, too.

Q. All the rest of them did it? A. Yes.

Q. Do you know about what time on the night shift?

A. It was after midnight. I don't know exactly what time it was.

Q. It was after midnight?

A. We didn't have no watch.

Q. Who raised the hatch doors?

A. The winches. We hooked on and the winches lifted it up.

Q. The stevedoring company crew operated the winches and the attachments to the door?

A. Yes.

Q. Do you recall how the doors were fastened up after they were raised?

A. The doors, when they were raised up, were leaned against a bulkhead. The two flanges, when it comes up to rest on it, had a big dog to flop over like that. It was pretty far and leaning in. I would say it was about that far from the bottom (indicating). [57]

Q. Indicating about three feet from the bottom. You have indicated a hook almost at a right angle hanging over the edge?

A. Yes, a piece of metal cut around like a hook.

(Testimony of Joseph Kokicks.)

Q. Do you remember whether or not those hooks were equipped with any pins to hold them in place?

A. I couldn't see any pins. If they had any pins, I couldn't say yes or no.

Q. Did you have anything to do with putting those hooks on yourself? A. Yes.

Q. What did you do?

A. Just slapped them on. The door had the flange and we just slapped the hook on.

Q. Did these doors have one or two hooks to hold them?

A. One, I think, on each side. I don't know if they had a fore end and an after end, but each door had a hook on. I know that much.

Q. With reference particularly to the hatch door for the port cover of the No. 4 hatch——

A. I didn't hear that.

Q. I say referring now particularly to the port cover of the No. 4 hatch. A. The port side?

Q. Yes.

A. Well, the port side, when we opened the hatch, the cover, [58] it was filled up with cans right to the top. We couldn't get in the hatch. We couldn't get in there. We crawled on our belly under the doors to get down there. And then they said we were going to get what we call the scows, the slingboards. I said, "Oh, oh," to myself. "I am going home if they are going to use the scows."

Q. When you say if they are going to use the scows, what are you talking about?

A. Then I went on the deck.

(Testimony of Joseph Kokicks.)

Q. Wait. I don't understand you. I don't know whether the Court does.

A. That is a slingboard, what is called scows.

Q. That is a board——

A. It is bigger than a regular board, much bigger.

Q. What is the purpose of it?

A. About five feet wide and about six, a little over, long.

Q. Five feet wide and six feet long?

A. Yes.

Q. What is that used for and how is it used?

A. They have hooks on the four corners.

Mr. Kay: Your Honor, there were no cargo boards used here and we are wasting a lot of time. I object to this on the ground it is incompetent, irrelevant and immaterial.

Mr. Licking: Let's see. The other witness testified that there was some colloquy about the use of these boards rather [59] than slings.

Mr. Resner: What difference does this make? This was not at the time of the accident.

Mr. Licking: It may make some difference. This was before the accident.

Mr. Resner: It is too remote.

The Court: Well, it is a new element in the case. I know nothing about it. I do not know what relation it has to the accident itself.

Mr. Licking: If the Court please, I merely intend to ask him if he used the boards. If they used the boards or refused to use them and they used nets.

(Testimony of Joseph Kokicks.)

The Court: Ask him directly.

The Witness: We didn't use it that way. If they used it, I would walk off the job. But we didn't use it. I went to the dock looking for the walking boss. I said, "If they are——"

The Court: They did not use the boards, Mr. Licking. Let's get along.

Mr. Licking: They did not use the boards on that shift, your Honor, that is true.

The Witness: I said, "If they are going to use the scows——"

Q. (By Mr. Licking): You did not use the boards on that shift?

A. No, we didn't use them.

Q. What did you use? [60]

A. I said, "We are going to use the nets."

Q. Did you use the nets?

A. Yes, we used——

The Court: He used the nets.

The Witness: And then——

The Court: You have answered the question.

Q. (By Mr. Licking): Did you work on the port side at all of the hatch?

A. Nobody worked on the port side.

Mr. Licking: That is all.

Mr. Kay: No questions.

Mr. Resner: I have no questions.

MARTIN O'SHEA

was called as a witness on behalf of the respondent, United States of America, and being first duly sworn, testified as follows:

The Clerk: State your name to the Court.

A. Martin O'Shea.

Direct Examination

By Mr. Licking:

Q. Mr. Shea, calling your attention particularly to the date about May 28, were you working for the Arrow Stevedoring Company then?

A. Yes, sir.

Q. Do you recall an accident having happened that day? [61]

A. Yes, a bad one, too.

Q. Do you recall what ship that was on?

A. The Edgecomb, I think it was.

Q. Do you know Mr. Bowers, who was on the stand here before you?

A. Yes.

Q. What was your position?

A. My position was day walking boss.

Q. As such, when you came on the job, did you see Mr. Bowers?

A. Yes, I seen Bowers.

Q. Did you have any conversation with Mr. Bowers?

A. Yes, he gave me—

Q. I beg your pardon. I just asked you if you had any conversation with him.

A. Yes.

Q. Did you have any conversation with particular reference to the hold in which this accident afterwards occurred?

A. No.

(Testimony of Martin O'Shea.)

Q. He did not talk to you at all about that?

A. None in the world, not a word said concerning the accident.

Q. Pardon?

A. He didn't say a word about that hold.

Q. He did not say a word about the hold where the accident happened? A. No.

Q. Did you yourself look at the hold? [62]

A. Went through the alleyway and saw the side ports up, and I presumed it was safe to work.

Q. You say you went through the alley?

A. You could see the boards.

Q. On the alleyway?

A. The alleyway 'tweendecks. You can look through and see the boards.

Q. 'Tweendecks. How far were you above the top of the hatch covering No. 4 hold?

A. Ten or fifteen feet, something like that.

Q. Did you look down there?

A. No, you can't look down from there, but you can just see the sideboards are up and you figure it is safe.

Q. From that position can you see whether they are safe or not?

A. Well, you understand any time those things is lifted up they are supposed to be safe. Otherwise they won't be up. They are supposed to be secured.

Q. It is the job of the person who lifts them to see that they are secured? A. Yes.

Mr. Kay: Your Honor, it depends on the particular situation.

(Testimony of Martin O'Shea.)

Q. (By Mr. Licking): How long have you been a stevedore? A. Oh, about 30 years. [63]

Q. As I understand it, you did not make any personal examination of this hatch cover where the accident afterwards happened?

A. No. It happened so quick I had no time to do anything.

Q. That happened soon after your gang came on the ship?

A. The gang came on at 7:00 o'clock. It happened about ten minutes past seven.

Q. You did have a conversation with Mr. Bowers that morning?

A. Yes, that morning, but he didn't say nothing about it not being safe.

Q. He didn't say anything about that hold at all?

A. No, not a word.

Q. Did he tell you he had opened it during the night? A. The boat was.

Q. Did he tell you he had opened it during the night? A. The boat was open.

Q. I didn't ask you that. I asked you did Bowers tell you he had opened that?

A. No, he didn't tell me he opened it. It was opened. That is all I know. I don't know who opened it, the stevedores or the Navy.

Q. It was open when you got there?

A. Yes, sir.

Q. You did not make any examination of it yourself to see whether it was safe? [64] A. No.

(Testimony of Martin O'Shea.)

Q. Why didn't you make an examination?

A. They worked already there.

Q. What?

A. They worked in that hatch all night, so why should I make an examination? It was up. The port side was up already.

Q. You assumed, since it was up, that it was safe?

A. It is always safe when it is up and it is secured. The Navy never opens those things up unless they make it secure and safe.

Q. Do you know whether the Navy opened it or not?

A. I don't know. I presume they opened it. They open it in the daytime because in the daytime I seen them; the Navy did it. I don't know whether they did that night or not.

Q. You do not know who opened it?

A. I don't know. It was open in the morning when I came in.

Q. You do not know then who opened it?

A. I don't know even yet who opened it because I wasn't there.

Q. You didn't take a look at it to see if it was safe or not?

Mr. Kay: That is objected to as asked and answered. These witnesses are his.

Mr. Licking: These witnesses are mine to a remarkably limited extent.

Mr. Resner: You called him, Mr. Licking.

Mr. Licking: Yes, I did. [65]

(Testimony of Martin O'Shea.)

The Court: Suppose you go ahead. It is getting late.

Mr. Licking: The question seemed to me to be perfectly proper.

The Court: Read the question.

(Question read by the Reporter.)

The Court: I think the witness has answered that question.

The Witness: Yes.

Q. (By Mr. Licking): Your answer is you did not look?

The Court: He said he saw the covers were up and he presumed it was safe. Being up, he went ahead with his work.

Q. Isn't that right?

A. That is right. When they are open they are safe. That has been the practice all the way through. We don't make an examination unless somebody told me.

Q. (By Mr. Licking): You say that is your practice. Do you mean that is stevedore practice?

A. When you see those ports open——

Q. That is stevedore practice?

Mr. Kay: Allow the witness to answer.

Mr. Licking: I thought he had finished.

Q. You are talking about stevedore practice?

A. When they are up there secured, they are supposed to be able to work them without any danger to anybody.

(Testimony of Martin O'Shea.)

Q. That is proper practice: the duty of seeing that they are secure, is that on those who raise them? [66]

A. That's it. Don't touch them.

Q. In other words, whoever raises the hatch cover has the duty to see that it is safe?

A. Secured.

Q. And you relied on the fact that whoever raised it had secured it? A. Had secured it.

Mr. Licking: That is all.

Cross-Examination

By Mr. Kay:

Q. Mr. O'Shea, had you worked a number of Navy ships? A. Oh, quite a few.

Q. And on all these Navy ships does the Navy allow you to go around and check everything on the ship?

A. No, they check themselves. Everything is checked by the Navy.

Q. Yes, and there is very little you do——

A. Very little.

Q. Just a minute. There is very little you do in the way of going around and checking every particular piece of equipment on a Navy ship, isn't that right? A. That is right.

Q. The Navy does all of that? A. Yes.

Q. They set up the rigging for you? They generally open the [67] hatches for you?

A. They do.

(Testimony of Martin O'Shea.)

Q. And then you do not go around to see if every hook is in place and every pin is in, do you?

A. Surely not.

Q. In your duties among Navy ships that is not a part of them, is it?

A. Any time you want anything done you ask the officer on deck and he tells the sailor to do it.

Mr. Licking: I object to that.

Q. (By Mr. Kay): On these Navy ships, it is not your practice and it never has been to go around and examine all the hooks and pins and all the rigging there? A. No.

Q. The Navy is supposed to do that before you ever get on that?

A. Before we ever get started.

Mr. Licking: I object to that.

The Court: Objection sustained as to what the Navy is supposed to do.

Q. (By Mr. Kay): What time did you go on that ship?

A. A little after 6:00. The night gang was gone already, and I relieved the night gang before. I usually get down about quarter past six. He shows me around, tells me what hatch they're working. When the gang comes down at 7:00 o'clock, call them in. [68]

Q. How many hatches were on this ship?

A. There were five hatches on that type of ship.

Q. How many were you working at this time?

A. During the night?

Q. No, when you went on.

A. Four hatches.

(Testimony of Martin O'Shea.)

Q. As walking boss, you had to cover that whole area? A. The whole area.

Q. You go around and make an inspection that you feel is proper? You take a look at things?

A. That is right. On commercial ships we do that possibly, but on Navy we seldom do. The Navy takes care of that. There are men to watch it, secure guys, boom, and what not.

Q. The practice on Navy ships is you hardly look at any of their equipment?

A. That is right.

Q. In the commercial ships you take more complete charge? A. Yes.

Mr. Kay: That is all.

Cross-Examination

By Mr. Resner:

Q. Mr. O'Shea, after the accident you saw that one of these hooks was bent and the pins were missing, didn't you?

A. Yes, the safety engineer was down, examined, took pictures, and one was out of proportion.

Q. One was bent and a pin was missing?

A. Yes. To secure properly we had to use a turnbuckle. I don't know whether you people know what a turnbuckle is. Kind of hooks, and chains. Lashed it down. The Navy did that after the accident.

Q. After the accident they lashed it?

A. Yes, after the accident they lashed it with turnbuckles.

(Testimony of Martin O'Shea.)

Q. After the accident?

A. Sure. They always do that after the accident, of course.

Mr. Kay: Mr. Licking, were some pictures taken by the Navy? It would help the Court, I think, if you had them.

Mr. Licking: What do you mean?

Mr. Kay: The witness said some pictures were taken down there.

Mr. Licking: He said something about some safety engineer.

Q. (By Mr. Kay): Were pictures taken down there?

A. Yes, they measured them and everything.

Mr. Licking: He didn't say anything about the Navy taking the pictures.

The Witness: That was the Navy.

Mr. Licking: There was a witness in the other case that did take them.

Q. (By Mr. Kay): Were some pictures taken there, Mr. O'Shea?

A. I believe so. They measured those things. It is so long ago, you know. [70]

Q. (By Mr. Licking): Two years ago this happened. Mr. O'Shea, it is a fact, isn't it, that you relied on the custom and practice and on what is proper stevedoring practice that the hatches being raised had been secured by whoever raised them?

A. That is right.

Mr. Kay: I object to that on the ground it is leading and suggestive and not proper redirect examination.

Mr. Resner: If your Honor please, he is cross-examining his own witness.

Mr. Licking: May I have the question read?

(Question read.)

Mr. Kay: We will ask that the answer——

The Court: Let the question and answer stand. Proceed.

Mr. Licking: That is all.

Mr. Kay: That is all.

Mr. Licking: The same contract was in force and effect in this case that was in force and in effect in the other case.

Mr. Kay: That is correct.

Mr. Licking: I have here a copy.

The Court: Is that the contract the Supreme Court refused to construe?

Mr. Licking: No, it is not, but it is similar.

Mr. Kay: It is not similar at all.

Mr. Licking: I hope we do not have to go into that argument. This is the contract that was in force and effect. [71]

The Court: Let that be marked in evidence.

Mr. Licking: There is a gentleman down here who furnished it to me. This gentleman has custody of the records.

The Court: Let it be marked subject to correction, and if it is not correct let us know.

(The contract in question was thereupon received in evidence and marked Respondent United States Exhibit A.)

Mr. Licking: If the Court please, that is the government's case.

CERTIFICATE OF REPORTER

I, J. J. Sweeney, Official Reporter, certify that the foregoing 72 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ J. J. SWEENEY.

[Endorsed]: No. 11880. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Arrow Stevedoring Company, a Corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Northern District of California, Southern Division.

Filed March 10, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,880

UNITED STATES OF AMERICA,

Appellant,

vs.

ARROW STEVEDORING COMPANY, a Corpo-
ration,

Appellee.

PETITIONER'S STATEMENT OF POINTS
INTENDED TO BE RELIED ON ON AP-
PEAL AND DESIGNATION OF PORTION
OF RECORD TO BE PRINTED

Petitioner adopts as points on appeal the Assignments of Error included in the Transcript of Record on file herein.

Petitioner designates for printing the entire Transcript of Record on file herein except that, as to the Exhibits, the same may be considered by the Court in their original form.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant U. S. Attorney,
Proctors for Appellant.

[Endorsed]: Filed Mar. 29, 1948.

Nos. 11,519 and 11,880

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

UNITED STATES OF AMERICA,
Appellant,
vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

On Appeals from the District Court of the United States
for the Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

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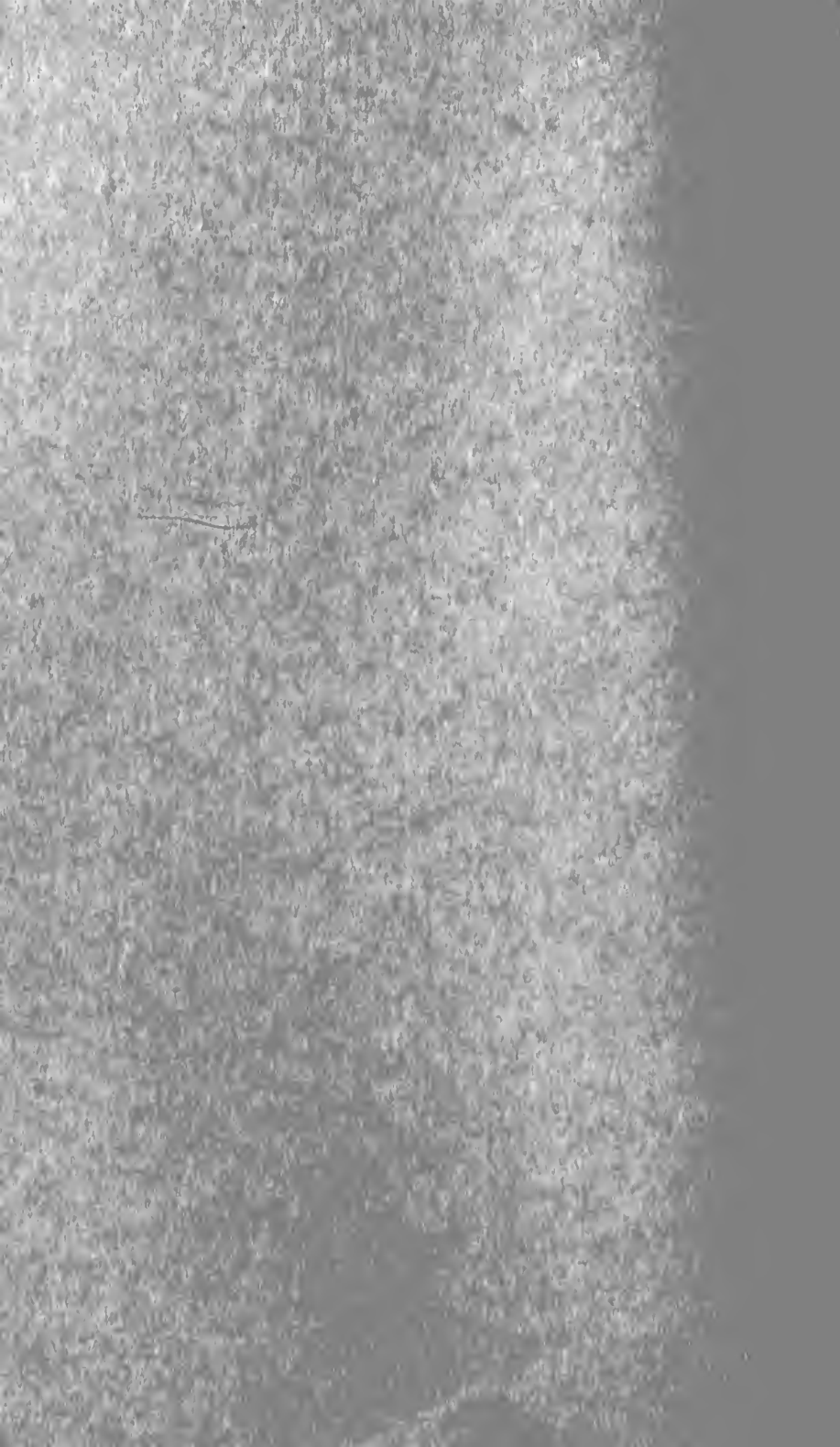
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FRANK P. O'BRIEN,

CLERK



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Nos. 11,519 and 11,880

IN THE
United States Court of Appeals
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UNITED STATES OF AMERICA,
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UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

On Appeals from the District Court of the United States
for the Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

These are consolidated appeals from two final decrees entered by the United States District Court for the Northern District of California, Southern Division, dismissing petitions by the United States for recovery-over, in whole or in part, of any amounts for which the United States was liable to the libelants in

two separate libels brought against the United States under the Public Vessels Act, 1925 (46 U.S.C. 781 *et seq.*), by an injured longshoreman and the personal representative of a deceased longshoreman to recover damages for injury and death, respectively, in consequence of an accident on board a Navy vessel.

In No. 11,519, the Williams case, the decree of the United States District Court for the Northern District of California was entered August 30, 1946 (Wms. R. 60).¹ Notice of appeal was filed November 15, 1946 (Wms. R. 61) and the appeal allowed December 16, 1946 (Wms. R. 63). In No. 11,880, the Mitchell case, the decree of the United States District Court for the Northern District of California was entered August 19, 1947 (Mehl. R. 35). Petition for appeal was filed November 14, 1947, and allowed the same day (Mehl. R. 37-38). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (as revised 28 U.S.C. 1291).

QUESTION PRESENTED.

Appellee Arrow Stevedoring Company contracted with the Navy to load and unload its vessels. The contract provided that Arrow would carry workmen's compensation and public liability insurance policies which should waive all rights of subrogation against the United States. The contract further provided that

¹Hereinafter the record in the Williams case is identified by the abbreviation "Wms. R." and that in the Mitchell case by "Mehl. R."

Arrow should remove and replace hatches without cost to the Government, but the actual practice was for the ship's crew to open and close the hatches. Arrow's night supervisor asked the ship's officers to open a certain hatch. They declined to do so because there were not sufficient crew aboard for the job. Arrow's night supervisor thereupon had his own men open the hatch. Arrow's men were unable to fasten the cover safely in the open position and Arrow's night supervisor either did not tell the ship's officers of the dangerous condition he had created or agreed with them that the stevedores would not work the hatch until the ship's personnel could fix it sometime next morning. But Arrow's day supervisor and day hatch boss, without any inquiry or investigation, sent their men to work in the hatch. The men had just begun to work cargo in that hatch when the cover fell, injuring one man and killing another. Compensation payments were made without award in both cases and the injured employee and the personal representative of the dead employee recovered separate judgments in their own names against the United States as the operator of the vessel. The judgment in favor of the injured employee gave Arrow an express lien for the amount of the medical expenses and compensation which it had paid him; that in favor of the representative of the dead employee did not.

The question presented here is whether in such circumstances Arrow is liable-over to the United States for the amount of such judgments or any part thereof.

STATEMENT.**The pleadings.**

To recover for injuries and death in consequence of an accident aboard the *USS Edgecombe* on May 28, 1945, libels were brought against the United States by Percy L. Williams (Wms. R. 2-10) and Edgar E. Reite, as Administrator of the estate of John Henry Mitchell, deceased (Mchl. R. 2-7), alleging that the injury and death involved had resulted from the negligence of the United States. While working in No. 4 port hatch on the vessel, Williams and Mitchell were struck by a falling hatch cover in circumstances hereafter described. Although the libels did not so allege, at the time such injury and death occurred Arrow Stevedoring Company, the employer of Williams and Mitchell, was engaged under a general stevedoring contract with the United States in unloading the *USS Edgecombe*, a public vessel of the United States Navy.

The United States filed answers (Wms. R. 12-17, Mchl. R. 8-12) and impleaded Arrow Stevedoring Company, the appellee in this Court, under Admiralty Rule 56 (Wms. R. 18-21, Mchl. R. 13-16). These answers and impleading petitions denied fault or negligence on the part of the Government and alleged that if any there was, it was that of Arrow, and that by reason of the duties which Arrow had undertaken and the terms of its contract, the United States was entitled to recovery-over, in whole or in part, for any liability imposed upon the Government in favor of the libelants. The answers of Arrow (Wms. R. 30-35,

Mehl. R. 17-22) denied fault or negligence and as an affirmative defense alleged that it had already furnished medical care and made payments pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of the value of \$1855.49 to Williams and of \$1282.41 to the heirs at law of Mitchell.

The stevedoring contract.

Arrow's contract with the United States contained, among others, the following Navy standard form clauses in respect of opening and closing hatches and of liability, indemnity and insurance (Wins. R. 265, 268-269):²

Article 6. Opening and Closing Vessel.

Without cost to the Government, Contractor shall remove and replace wedges, hatch bars, tarpaulins, hatches and beams with respect to all decks, both during loading or discharging operations and to make the hatches ready for sea. Stevedoring Contractors are required to cover all hatches at their own expense if not working at night.

* * * * *

Article 21. Liability and Indemnity.

(a) The Contractor shall procure and maintain at all times during the continuance of this

²There appears to be some confusion and duplication in the record in respect of the numbering of the clauses in question. This stems from the fact that the contract document included a number of amendments in the course of which the clauses respecting liability, indemnity and insurance were repeated. It is not believed that the minor variations in punctuation are material, since the clauses were obviously intended to be the same.

agreement a policy or policies of insurance with underwriters to be approved by the Contracting Officer insuring the Contractor against liability for injury to or death of any person or persons to an amount not less than \$250,000.00 in any one accident, and for property damage occasioned to any pier, car, lighter, vessel, cargo or other property to an amount not less than \$250,000.00 in any one accident arising out of any operations performed hereunder.

(b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the negligence or wrongful acts or omissions of the Contractor's officers, agents or employees or through fault of its equipment or gear, [195] subject, however, to the following limitations and conditions:

(1) Contractor's liability to the Government shall be limited to the sum of \$250,000.00 for loss or damage in connection with any single catastrophe, accident or occurrence in the event that any such catastrophe, accident or occurrence and such loss or damage shall arise from or be in any way attributable to or connected with the presence or proximity of ammunition, explosives, gasoline or other inherently dangerous cargoes or the loading, discharging or handling of such cargo by the Contractor.

(2) The Contractor shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government, or resulting from compliance by officers, agents, or employees of the Contractor

with specific directions of the Port Director, NTS, 12th Naval District. Nor shall the Contractor be so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government.

* * * * *

(4) Notwithstanding any other provision of this contract, the Contractor agrees to waive any right of reimbursement for loss or damage of any kind or character which it may have against the Government under any provision of this agreement if said loss or damage is covered by insurance and Contractor has collected or may collect for said [194] loss or damage from the insurance company. The Contractor further agrees to have attached to and made a part of all insurance policies issued pursuant to this agreement on operations thereunder a rider by the terms of which the insurance company agrees to waive any and all rights of subrogation which it may have against the United States by reason of any payment under said policy.

The case of the libelants against the United States.

The facts respecting the occurrence of the accident and the liability of the United States to the libelants, as distinct from the cause of the accident and the liability between the United States and appellee Arrow, are substantially undisputed and may be summarized from the findings filed by the Court below. Williams and Mitchell, together with four other long-shoremen employed by Arrow, were working on the *Edgecombe* at the level of the third deck in No. 4

port hatch;³ they came aboard about 7:00 a.m., at the beginning of the day shift, and went below to the hatch's lower compartment for the purpose of unloading boxes of empty ammunition shells which completely filled the compartment (Wms. R. 37, Mchl. R. 24). The port and starboard lower compartments of No. 4 each had a square hatch cover about eight feet wide, measured athwartship, by about fourteen feet long, measured fore and aft; each of these covers weighed about 3500 pounds and was hinged on its inboard side along the center line of the vessel (Wms. R. 37-38, Mchl. R. 24-25). In order to provide a means of securing the hatch covers in the open or vertical position and preventing them from falling shut while cargo was being worked, two pawls or dogs, roughly in the shape of a hook, were fitted to hold the upper corners of each cover; one dog of each pair was attached to the forward bulkhead of the hatch, the other to the aft bulkhead; each dog swung on a shaft extending in a fore and aft direction from the bulkhead; when the cover was in the open or vertical position, each dog was intended to swing down upon the upturned edge of the cover, so as to extend over and beyond the edge and down a few inches from the top, thereby gripping the edge and holding the cover from falling shut; for a locking device, to prevent the dog from raising and releasing its grip on the hatch cover, there was a hole in each dog through which a metal

³It appears from the testimony generally that No. 4 hatch had a "trunk" or "well" somewhat "like an elevator shaft" from the weather deck to the level of the third deck, with no intervening cargo compartments until the hatch covers of these lower compartments were reached.

locking pin was supposed to be inserted into a corresponding hole in the bulkhead; these locking pins were supposed to be attached to the bulkhead near the holes by means of chains (Wms. R. 38, Mehl. R. 25). The dogs and locking pins were at a height beyond the reach of persons standing on the deck and no convenient means was provided for putting the dogs and locking pins in place to hold the hatch covers and it was the custom on the *Edgecombe* and other Navy vessels for the Navy crew to open and secure the hatch covers at the request of the stevedores (Wms. R. 40-41, Mehl. R. 27-28).

When Arrow's day gang began work on No. 4 hatch, both hatch covers were already raised and standing in a vertical position upon their hinges; Williams, Mitchell and another member of the gang stood on top of the cargo ready to commence work and a cargo board was lowered to them; the cargo board was carefully lowered through the hatch by means of falls from a winch and booms and neither it nor the falls struck the hatch cover; after the cargo board had come to rest on top of the cargo, the hatch cover suddenly fell shut and before Williams and Mitchell could jump aside they were crushed (Wms. R. 37-38, Mehl. R. 25).

The Court below found as factual conclusions that at the time of the accident the vessel was "in the control of the United States Navy" which was negligent "in not taking proper and reasonable precautions to secure said hatch cover so it would not fall" and that the fall of the hatch cover and the injury and death resulting therefrom were the consequence of

the defective and unseaworthy condition of the vessel (Wms. R. 41, 42, Mchl. R. 27, 28). As conclusions of law the Court stated that the vessel was unseaworthy, that the United States was negligent, while libelant Williams and libelant's decedent Mitchell were not negligent (Wms. R. 48, Mchl. R. 33-34). It assessed damages at \$9259.50 in Williams' case (Wms. R. 49) and at \$18,000.00 in Mitchell's case (Mchl. R. 34).

The testimony in the Government's case against Arrow.

The foregoing facts, as found by the Court below, establish the liability of the United States to the libelants for breach of its non-delegable duties as operator of the *USS Edgecombe* to furnish a seaworthy vessel and to exercise due care to provide a safe place of employment for the longshoremen working aboard regardless of whether the employees of the United States or those of appellee Arrow, its stevedoring contractor, were responsible for the negligent manner in which the hatch that fell and injured libelants was opened without being properly fastened and secured. Accordingly, the United States does not deny liability to libelants as found by the Court below and does not prosecute an appeal as against them.⁴ But in respect

⁴Because the decree in favor of Williams contains a declaration of lien thereon in favor of Arrow to the extent of \$1,855.49 on account of compensation payments (Wms. R. 60), an appeal was originally taken as to libelant Williams as well as Arrow. This was later dismissed in the hope that counsel would stipulate to permit payment to Williams of the net amount to which he is beneficially entitled with reservation of the rights of Arrow and the United States *intersese* pending the outcome of this appeal. Counsel have refused so to stipulate, however, and continue to prevent the United States from paying Williams.

of the question of whose employees proximately caused the place of employment to be unsafe, the findings and conclusions of the Court below are contested on this appeal and, accordingly, the testimony on that point will be summarized for the convenience of the Court.

In the *Williams* case testimony concerning the opening of the hatches was given by Claude Bowers, Arrow's night walking boss, who was ship supervisor for the stevedores when the hatches were opened; by Alf Larsen, Arrow's day hatch boss, who had charge of the stevedore gang at No. 4 hatch when the accident occurred; and by Herbert Carnes, boatswain's mate, second class, on the *Edgecombe*, who had charge of No. 4 hatch. In the *Williams* case it was stipulated that the Court should consider the transcript of testimony taken in the *Williams* case and hear certain further testimony. This additional testimony was that of Martin O'Shea, Arrow's day walking boss, who was ship supervisor for the stevedores at the time of the accident, Claude Bowers, Arrow's night walking boss, who was recalled to give further testimony, and Kasimir Anzulovich and Joseph Kokicks, Arrow's employees who actually opened the No. 4 port hatch cover.

Claude Bowers, Arrow's night walking boss, was called as a witness for the Government in the *Williams* case (Wms. R. 276-305). He testified that he had been a stevedore for twenty-five years and the night of May 27-28, 1945, preceding the accident, was ship supervisor for the stevedores on the *USS Edgecombe* (276, 278). Bowers had charge of the various fore-

men or hatch bosses and their gangs working that ship (277, 287, 293). The night shift was from 7:00 p.m. until 6:00 a.m. and the day shift from 7:00 a.m. to 6:00 p. m. (278). In the course of his duty as walking boss he remained during the hour between the gang change to supervise and to show the day walking boss what was being done (278, 287).

When Bowers began the night shift, the gang working No. 4 hatch were just starting to unload the empty shell cases which were in the trunk or well of the hatch which extended like an elevator shaft from the top deck to the hatch covers of the lower compartment at the bottom (278-280, 288).

About midnight, Bowers testified, he spoke to the officer of the desk, asking him "to rig the gear for the offshore [or port] tank because the cover was not in proper position" (281, 283, 290-291). The officer refused on the ground that he did not have enough men available until morning (283-284, 291). Bowers and the officer ultimately agreed that the stevedores would work only the starboard or inshore hatch and the port hatch would be rigged sometime during the morning when ship's personnel were available (284, 304). The work of unloading the trunk of the hatch continued until about 2:00 a.m., when it was finally clear and the hatch covers of the lower compartments exposed (280-281).

When the covers were exposed, Bowers said, he had the hatch boss and his gang open the hatch covers in his own presence and under his direction (285, 293-294, 299). They followed the usual practice and

opened the starboard and port covers at the same time, beginning with the port side (292, 294, 301). They hauled up the covers with the ship's gear and, by means of one man lifting up another, put the dogs or hooks down over the covers (294, 301-302).

The port cover, Bowers testified, looked to be in a safe condition (294-295, 297). But in fact the locking pins were not fitted into place because the pin for the forward hook was bent, while the pin for the after dog was not found (296, 302-303). Bowers testified categorically, "That is why we didn't work in the hatch" (296).

Bowers testified he did not report this condition of the hatch cover to the officer of the deck (296). In any case, he stated, with the ship's gear rigged as it was, it would have been dangerous to work the port hatch and, knowing this, the night gang did no work there (296-297). The ship's gear was already rigged in proper shape for them to work the starboard or inshore hatch safely (284-285). The stevedores continued to work the starboard hatch throughout the night, but there was still cargo in that hatch when they finished the shift (284-285, 288, 291-292).

When the night gang quit and the day gang started work, the port hatch cover, Bowers testified, was still open (286-287). No cargo was removed from the port side and when the night gang left, that hatch was still completely full (288-289, 304).

Alf Larsen, *Arrow's day hatch boss*, was called as a witness by the libelant in the *Williams* case (Wms.

R. 155-186). He testified that he had been a stevedore since 1906 and on the day of the accident was foreman of a gang of sixteen men (156). He and his gang had been working on the *Edgecombe* for about two days before that morning, but they had not worked No. 4 hatch (157). About 4:00 p.m., the day before the accident, while working in the vicinity of No. 5 hatch, one of the ship's petty officers asked Larsen if No. 4 hatch was to be worked that night (159-160, 161, 162). He replied, "I suppose they will, but you had better go and see the walking boss" (163).

When Larsen came aboard the morning of the accident, he said, he went up on the top deck; No. 4 hatch was opened up and he "looked down in the hatch and everything seemed safe to me" (163, 164). There was no cargo in the trunk of the hatch between the top deck and the covers of the lower compartment which was open, but on the port side no cargo had been removed and it was filled to within six or eight inches of the top with empty shells (165-166). His men did not raise the cover; it was already up when they got there (168).

When he and his gang began work at 7:00 a.m., six men went below deck, Larsen testified, while three men and himself stayed on deck and the rest of the gang were on the dock (156). A four-by-six-foot cargo scow was carefully lowered into the port hatch, which was about eight to ten feet wide by about twelve feet long, without striking anything; it came to rest on the edge of the hatch (166).

Larsen was on the top deck in the after end of the hatch and a few minutes after the scow was let down, he saw the hook on the forward end of the hatch cover slip and work up and down (167-168). He yelled, "Look out," but the cover took only seconds to fall; three men jumped clear but three were caught underneath (168-169). After the cover was raised again and the two covers lashed together, Larsen testified, he looked at the after hook and saw it was bent (169-170). He did not examine the locking pins of the dogs and did not know their condition or whether there was a pin for the forward hook or dog (179-183).

Larsen testified that in his opinion the bent hook could not hold the cover; "as a rule you secure the two tank tops together" (171). The cover itself was in good condition; "there was nothing defective about the cover; whether the fastening was defective or there was carelessness" he did not know (173). He admitted on cross-examination that when he sent his gang down the hatch he did not know whether or not there was anything holding the hatch cover except the one forward hook and did not know whether it had any locking device (185-186, 183, 185).

Herbert Carnes, boatswain's mate, second class, in charge of No. 4 hatch on the USS Edgcombe, was called as a witness for the Government in the Williams case (Wms. R. 205-275). He testified that he had eight men under him and was in complete charge of all men and all work in the area of No. 4 hatch as far as concerned the activities of the Navy crew

in rigging and moving booms, changing cargo gear and checking all rigging for working cargo (209, 208, 222). He was on duty the day of the accident and no other non-commissioned officer had any authority over men working around No. 4 hatch so long as he was aboard and no orders from any superior officer concerning opening the hatch could be given except by going through him (209, 215, 264).

About 4:00 or 4:30 p.m., Carnes testified, he either learned for himself or was told by the Chief Petty Officer to take the hatch cover off No. 4 hatch on the top deck (212-213). Before their quitting time for the day, Carnes and his men had uncovered the hatch on the upper deck and raised the booms so the stevedores could unload the cargo stowed in the top of the hatch (213, 218). Before he knocked off his men he went to check with the stevedore boss about whether they wanted him to have his crew open the lower hatch when the stevedores finished getting out the cargo on top of the lower hatches (209-210, 213-214).

Carnes spoke to a stevedore who, he said, appeared to be a foreman and acted and was dressed "like one of the boss men around there" (209-210, 214). Carnes testified that he asked if he could keep the Navy crew "on deck" so that when the stevedores "finished unloading the cargo that was in the hatch we could open the hatch on the lower deck," but that the man said no, "that they would get to it when they got the cargo unloaded" (217-218, 221). Carnes had half his crew sleeping aboard and available to be turned

out if there was any rigging which had to be done during the night (249-250).

After he had knocked off his men, Carnes said, he went to dinner and about 9:00 p.m. went up to a small room or locker near No. 4 hatch where he slept, waking off and on through the night and hearing cargo being worked in the starboard side of No. 4 hatch (219-220, 227). About 6:30 the next morning Carnes had breakfast, returned to the locker around 7:00, and shortly after heard the hatch cover fall (227-228). He started below and met the ship's commander who told him to get the hatch open as soon as possible (228). When Carnes got down to the lower hatch, the cover was just being lifted by the stevedores and he went back up (239, 259).

When he got back up on the main deck, Carnes found the stevedores had already opened the hatch; he saw that they had the forward hook or dog on the hatch cover, but the after dog was not down over the edge of the cover (228, 261). Carnes therefore sent one of his men down to put the pin in the forward hook and put the after dog on the cover (228). While the man was down there putting the pin in the forward dog, the ship's executive officer looked down and called out to put a turnbuckle from one cover to the other (229).

There were turnbuckles and rigging right by the covers, Carnes said, for the man to put on the turnbuckle (229). Meanwhile Carnes had another of his men take the winch and put a slight strain on the

cover and the man below then put the aft dog over, put the pin through it and then came back topside (229, 260-262). Carnes was present when the hatch cover was raised after the accident and later when it was closed; he had been present when the cargo of empty shells which was being discharged had been loaded and the hatches closed; at all these times both dogs and both locking pins were there in place and the cover was not warped or distorted (234-237).

Martin O'Shea, *Arrow's day walking boss*, was called by the Government at the trial of the *Mitchell* case for the purpose of corroborating the testimony in the *Williams* case (Mchl. R. 98-107). He testified that as day walking boss he usually got down about 6:15 a.m.; the night walking boss would show him around, tell him about what hatch was being worked, then when the day gang comes on, at 7:00 a.m., he calls them in (104).

When he came on the job the morning of the accident, O'Shea testified, he saw Bowers, the night walking boss; Bowers did not say a word about the No. 4 hatch where the accident later happened (98-99). O'Shea looked in No. 4, saw the "side ports" or lower hatch covers were up, "and I presumed it was safe to work" because (99)—

"Well, you understand, any time those things is lifted up they are supposed to be safe. Otherwise they won't be up. They are supposed to be secured."

O'Shea made no personal examination of the hatch cover to see whether it was safe and Bowers didn't

say anything about its not being safe nor that he had opened it during the night (100). He made no personal examination, O'Shea said, because (101),

“They worked in that hatch all night, so why should I make an examination? It was up. The port side was up already. * * * It is always safe when it is up and it is secured. The Navy never opens those things up unless they make it secure and safe.”

Although he didn't know whether the Navy opened it, O'Shea testified, he “presumed they opened it”; it was open in the morning when he came on (101). In not inspecting, he relied upon what is proper stevedoring practice, that the hatches being raised had been secured by whoever raised them (106). O'Shea explained, “When they are up they're secured, they are supposed to be able to work them without any danger to anybody” and he relied on that (102-103).

Claude Bowers, Arrow's night walking boss, who had already testified in the *Williams* case, was called a second time by the Government to testify in the *Mitchell* case. Bowers reiterated that as night walking boss, in order to communicate to the day shift the condition of the work, he was required to be on the ship before and after the night shift men who worked from 7:00 p.m. to 6:00 a.m. (45-47).

Bowers stated that when the day shift came on the morning of the accident he reported to O'Shea, the day walking boss, that the holding device for the hatch cover was defective; he said (55-56), “I told

him that the pin was sprung on the top, and they would have to see the Navy to get that fixed before they started operating in that hatch."

His conversation with O'Shea about the condition of the hooks and pins of No. 4 port hatch cover took place, Bowers said, "about twenty minutes after six, I guess, on that hatch" (56). Bowers testified (81), "I told him one of them was sprung; he couldn't get it in place properly." He also told O'Shea that the other pin was missing (81).

Bowers confirmed his testimony in the *Williams* case that although the port hatch cover appeared safe when looked at from the top deck, when looked at from the deck below it could be seen that the cover was actually not safe because the hook or dog was bent and the pins were not there (56, 57, 58, 62, 67, 86). It appeared safe, he said, "If you just looked at it" (71). But he "wouldn't go in there until it was fixed" (76). After the accident, when the hatch covers were lashed together, the stevedores paid no further attention to the dogs or hooks and he could not state whether they were fixed or not (73, 76).

Bowers stated he was given no instructions as to how to secure the hatch doors (59). His men just pulled them open with the ship's gear and put the hooks over the covers by one man lifting another up so that he could reach it (62-63). His men opened the hatch about 1:30 a.m., at which time one of the hooks or dogs, which hold the open cover in place on the port side, was sprung and one of the locking pins was bent, while the other was not found (48-49).

Bowers testified that they raised both port and starboard covers at the same time but didn't work the port side because the cargo gear was not trimmed right. (53). The condition of the hooks and pins on the port cover was called to his attention right away (50).

Bowers changed his testimony from that given at the *Williams* trial as to whether he told the officer of the deck about the hooks on the port hatch cover. When he went to the officer of the deck about rigging the booms so both sides of the hatch could be worked, Bowers said he also reported the condition of the bent dog and pin (55, 59). The officer said he would have it fixed in the morning as soon as he had the men available; "he didn't say what time, as soon as he had the men available" (55, 59).

Bowers stated that he told the officer of the deck that he would leave the port side hatch altogether and work on the other side; the officer responded, "All right" (59). Thereafter the stevedores continued to work on the other side and did not work on the port side (55).

Kasimir Anzulovich and Joseph Kokicks, Arrow's employees who opened the lower hatch covers, were also called in the *Mitchell* case (Mehl. R. 89-97) to corroborate the testimony already taken in the *Williams* case. Both men testified that they had worked on the night shift as members of the gang which opened No. 4 lower hatch on the *Edgcombe* (89-90, 93-94).

Anzulovich stated that he saw no Navy personnel around; he saw the two hooks to fasten the covers

open, but saw no locking pins; he lifted up another stevedore and the latter dropped the hooks down over the hatch covers (90, 92). The stevedores worked in cargo on the port side of the lower hatch, but when they left the ship at the end of the shift both hatch doors were still standing open the same way as when they opened them (92-93). He saw no Navy personnel around at any time while he was working there (93). When he came to work the evening after the accident the hatch covers were lashed together (91). He said if that had been done before there would have been no accident (92-93)—

“I don’t know who was supposed to do it. If I was a foreman I would do it myself, even if the Navy wasn’t there, for safety first.”

Kokicks testified that sometime after midnight he and the rest of the gang “hooked on the winches” and lifted the doors (94). When raised and open they were fastened by a big dog over the edge of the cover (94). He did not see any locking pins although he put the hooks on himself, “Just slapped them on” (95).

The Court’s findings and decision in the Government’s case against Arrow.

In neither case did the District Judge himself make findings of fact and conclusions of law. In each case the findings and conclusions proposed by successful counsel were adopted bodily by the Court (Wms. R. 36-49, Mchl. R. 23-34). Indeed, in the *Mitchell* case they appear in the record with the caption “Im-

pleaded Respondent's Proposed Findings of Fact and Conclusions of Law and Decree" (Mehl. R. 23).

These findings signed by the Court may be condensed as follows: Arrow neither knew nor had reason to expect the defective condition which existed in the hooks and locking pins for the hatch cover; it was the custom and duty of the Navy crew to open and fasten the hatch cover and the Navy crew opened, raised and secured the hatch cover and "failed to use reasonable care in fastening said hatch cover, and failed to fasten it securely and safely so as to prevent its falling" (Wms. R. 40, fng. 14, 41, fng. 17, 42, fng. 22; Mehl. R. 24, fng. 6, 28-29; fng. 16, 21). Arrow was not guilty of any negligence proximately causing or contributing to the accident, the injuries and damage "resulted from default of ship and gear supplied by the respondent United States" (Wms. R. 45-46, Mehl. R. 30, 32).

The Court concluded as a matter of law (Wms. R. 48-49, Mehl. R. 33-34) that the respondent-impleaded Arrow was not negligent (Wms. Concl. 5, Mehl. Concl. 5) and that "The fall of the hatch cover and the libellant's [decedent's] injuries were proximately caused by the defective and unseaworthy condition of said vessel in respect to the means for securing said hatch cover and by the negligence of the United States" (Wms. Concl. 6, Mehl. Concl. 6). Decrees were accordingly entered in each case dismissing on the merits the Government's impleading petitions against Arrow. This appeal followed.

SPECIFICATION OF ERROR.

The District Court erred:

1. In holding that appellee Arrow Stevedoring Company and its employees were not negligent.
2. In failing to hold that the employees of appellee Arrow Stevedoring Company were negligent.
3. In holding that the fall of the hatch cover and the injuries resulting therefrom were proximately caused by the negligence of the United States.
4. In failing to hold that the negligence of appellee Arrow Stevedoring Company and its employees was the proximate cause of the falling of the hatch cover and the injuries resulting therefrom.
5. In holding that appellee Arrow Stevedoring Company is not liable to the United States for any part of the loss or damage.
6. In failing to hold that the United States is entitled to recovery-over against Arrow Stevedoring Company for the loss or damage.
7. In dismissing the impleading petitions of the United States against Arrow Stevedoring Company.

ARGUMENT.

I.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE NEGLIGENCE OF ARROW IN SENDING ITS MEN TO WORK UNDERNEATH AN INSUFFICIENTLY SECURED HATCH COVER.

The review of the testimony concerning the opening of the hatch covers (*supra* pp. 8-9) shows conclusively that Arrow's night shift stevedores opened No. 4 lower hatch cover on both the port and starboard sides and that they were fully aware that they had not been able to secure it safely in the open position so as to insure that it would not fall and injure any men who might work beneath it. While the testimony conflicts as to whether Arrow's night walking boss reported the condition to the day walking boss who relieved him, there is no doubt as to the knowledge and responsibility of Arrow. Similarly, it is unimportant whether Arrow's night walking boss did not report to the Navy lieutenant who was officer of the deck the dangerous condition in which the stevedores left the open hatch cover or whether he did make such a report. The testimony is plain that if he did so report it, he further reached an understanding with the officer of the deck that the stevedores would work only in the starboard hatch and that no work would be done in the port hatch, where the injury occurred, until after the dangerous condition had been corrected sometime during the following morning. In these circumstances, it appears indisputably from the record that Arrow's employees had complete charge of the hatch, with full knowledge of the dangerous condition complained of, and had assured the ship's per-

sonnel that no work involving exposing the stevedores to the dangerous condition would be done. It is thus plain that the sole proximate cause of the falling of the hatch cover and the resulting injury and death was the negligence of Arrow's foremen in permitting the stevedores to work in the lower No. 4 port hatch after having agreed with the ship's officers that they would not do so.

1. **The findings of negligence signed by the District Court are clearly erroneous and should be disregarded.**

In the cases now at bar the judges who heard the evidence did not themselves make findings of fact and conclusions of law as required by Admiralty Rule 461½. The indefinite and argumentative documents which appear in the record as findings and conclusions are the work of counsel successful in the District Court. It is clear from a comparison of the findings as signed at counsel's request in the *Williams* case (Wms. R. 36-49) with the requested modifications by the Government (Wms. R. 49-59) that the trial judge omitted to exercise his independent judgment in any respect whatsoever. Indeed, in the *Mitchell* case the findings and conclusions appear in the record (Mchl. R. 23-34) with the heading, "Impleaded Respondent's Proposed Findings of Fact and Conclusions of Law and Decree."

It is elementary that where the trial judge does not make findings of his own, using the proposals of counsel for both parties as a guide to assist him in reaching his own decision, but merely accepts the findings

prepared by successful counsel, the Appellate Court should not treat such purported findings as entitled to the weight given findings made by the trial judge himself. E.g. *The Severance*, (4th Cir., 1945) 152 F. (2d) 916, 918, collecting cases.

Moreover, findings concerning negligence such as are here in question are not findings of fact in the true sense so as to be binding unless clearly erroneous. They are mere factual conclusions respecting a standard of conduct and are reviewable as a matter of law. *Great Atlantic & Pacific Tea Co. v. Brasileiro*, (2d Cir., 1947) 159 F. (2d) 661, 665; *Hutchinson v. Dickie*, (6th Cir., 1947) 162 F. (2d) 103, 106; see *Johnson v. Kosmos Portland Cement Co.*, (6th Cir., 1933) 64 F. (2d) 193, 195.

But in any event we believe that, as shown hereafter, the purported findings found in the records now at bar are clearly erroneous and contrary to the evidence insofar as they purport to hold that the employees of Arrow were free from any negligence which caused the injury of Williams and Mitchell, but that, instead, it was the United States which was negligent.

2. **Arrow was negligent in sending its men to work under the hatch cover when it had knowledge of the dangerous condition prevailing.**

The testimony on the *Williams* trial establishes beyond any shadow of doubt that Bowers, Arrow's night walking boss, and his men who opened No. 4 lower hatch, knew that the port hatch cover had not been safely secured by the stevedores. In such circum-

stances it was Bowers' duty to explain and point out the dangerous condition of the cover to the day walking boss who relieved him.

Indeed, as night walking boss, Bowers was required to remain during the hour between 6:00 and 7:00 a.m. for this very purpose. The silence of the record of the *Williams* trial as to whether or not Bowers did in fact point out the dangerous condition to O'Shea, Arrow's day walking boss, is entirely immaterial insofar as regards Arrow's responsibility. Arrow is charged with Bowers' knowledge and his failure to report the situation to O'Shea does not excuse Arrow.

For the same reason the conflict in the additional testimony received at the *Mitchell* trial cannot affect the result. That Bowers testified that he had told O'Shea about the dangerous condition of No. 4 port hatch cover, while O'Shea testified that Bowers had not, cannot alter the fact that Arrow is responsible for the knowledge which it gained through Bowers, its night walking boss, even though he failed in the performance of his duty to Arrow in communicating such knowledge to O'Shea, its day walking boss.

It seems plain, moreover, that even if Bowers' testimony is totally disregarded, still the testimony of Arrow's day gang boss Larsen at the *Williams* trial and Arrow's day walking boss O'Shea at the *Mitchell* trial is plain that Arrow is chargeable with their negligence in failing to make any inspection whatsoever with a view to ascertaining whether or not the hatch cover was in a safe condition before they sent their men to work beneath it.

It is well established that the stevedore contractor owes a duty to inspect the ship's appliances in order to ascertain whether or not they are in safe condition for the stevedores to make use of them. *Vanderlinden v. Lorentzen*, (2d Cir., 1944) 139 F. (2d) 995; *Grillo v. Royal Norwegian Government*, (2d Cir., 1943) 139 F. (2d) 237; *The Thomas P. Beal*, (W. D. Wash., 1924) 295 Fed. 877, 880; *The Jethou*, (D. Ore., 1924) 2 F. (2d) 286. And Arrow assumed an obligation to the United States to perform that duty by reason of its contractual undertaking to load and unload the vessel in a proper and workmanlike manner.

3. **The United States was entitled to rely on Arrow's performing its duty not to expose its employees to known dangerous conditions on the ship.**

The evidence is plain that the United States was so situated as to be entitled to rely on Arrow's performance of its duty to protect its men. This is so whether we accept Bowers' testimony at the *Williams* trial that he did not advise the officer of the deck of the fact that Arrow's men had been unable to safely secure No. 4 port hatch cover, or accept his testimony at the *Mitchell* trial that he did tell the officer of the deck of the unsafe condition but agreed with the latter that the stevedores would do no work in the port hatch until the ship's gear could be re-rigged and the cover properly secured sometime next morning.

In either event the United States had no reason to believe that Arrow would thus needlessly expose its men to a known danger. It was entitled to assume that once Arrow knew of the dangerous condition

existing, it would not allow its men to work where they were exposed to the danger of the hatch cover falling until there was reason to believe that the ship's personnel had corrected the condition of the cover so that the danger no longer existed. As this Court observed in *Seaboard Stevedoring Corp. v. Sagadahoc SS. Co.*, (9th Cir., 1929) 32 F. (2d) 886, 887, "We are aware of no rule under which the ship's officers should be required for appellant's [stevedore's] benefit to exercise a high degree of vigilance to see that it performs a plain duty." As the Court observed in *Cornec v. Baltimore & O. RR. Co.*, (4th Cir., 1931) 48 F. (2d) 497, 502, the stevedore owes to the vessel and her owners the duty of using due care; the latter owe no such duty to the stevedore.

When it is thus established that appellee Arrow owed a contractual duty to the United States to exercise due care not to expose its stevedores to the dangerous condition, the burden was upon it to show why it failed to do so. *Pan-American Petroleum T. Co. v. Robins Dry Dock & R. Co.*, (2d Cir., 1922) 281 Fed. 97, 109. This burden Arrow made no attempt, in the Court below, to sustain. The testimony of any of its employees was elicited solely as a result of certain of them having been called by libellant and the Government. Arrow itself compelled the other parties to call its people as adverse witnesses. For its own part, it called none of them and if the record is wanting in definiteness in respect of what action was taken by the stevedores to apprise the officers of the ship of the dangerous condition of the lower No. 4 port

hatch cover in the state in which they left it when they opened the hatch, it must be assumed that this is because Arrow knew such testimony would be unfavorable to it. *The New York*, (1899) 175 U. S. 187, 204; *The Bolton Castle*, (1st Cir., 1918) 250 Fed. 403, 406; *The Eastchester*, (2d Cir., 1927) 20 F. (2d) 357, 358; *Barrett v. City of New York*, (S.D. N.Y., 1947), 73 F. Supp. 832.

4. The failure of the United States to maintain a seaworthy locking device on the hatch cover was not the proximate cause of the accident.

That libelants were entitled to recover from the United States, because of a breach of its non-delegable duty to furnish a seaworthy ship with a proper locking device on the hatch cover and to exercise due care to furnish libelants a safe place in which to work and that the Government could not defend on the ground that it had made a contract with Arrow to unload the vessel in a proper and workmanlike manner, will not serve to relieve Arrow from liability-over to the United States for breach of such contractual duty. On the testimony which we have summarized (*supra* pp. 19-22) there can be no doubt that the negligence of Arrow in sending its men to work in the hatch underneath the improperly secured hatch cover was the intervening and sole proximate cause of the damage and loss involved.

The principle involved is elementary. In *Restatement of Torts*, Section 441, it is stated:

- (2) The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is

liable for another's harm are usually, but not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actors' negligence is often called passive negligence, while the third person's negligence, which sets the intervening force in active operation, is called active negligence.

The cases supporting this clause of the *Restatement* are legion. One of the most famous admiralty cases of this character is *The Mars*, (S.D. N.Y., 1914) 9 F. (2d) 183, a decision by Judge Learned Hand, who said of a similar case where the dominant cause was the superseding negligence of the party seeking to charge the other with liability:

It may be thought that this was a proper case for dividing damages. * * * I think not. I take it that the distinction there is this: Where two joint wrongdoers contribute simultaneously to an injury, then they share the damages; but where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second.

That has been the rule in several admiralty cases.

The Egyptian (1910), A. C. 400.

Compare, *The Redwood* (9th Cir., 1936), 81 F. (2d) 680, where this Court denied recovery for a total loss of a vessel injured in collision on the ground that the proximate cause of the loss was the attempt of the libelant to tow his boat to port rather than to beach her in safety.

We submit, therefore, that proper consideration of the evidence in these cases establishes beyond any question of doubt that the sole proximate cause of the accident was the negligence of Arrow in sending its employees to work in the hatch after it was aware both of the dangerous condition and of the fact that the ship's personnel did not expect the stevedores to expose themselves to the danger and did not intend to remedy the dangerous condition until a later time.

II.

APPELLEE ARROW IS LIABLE-OVER FOR THE AMOUNTS THE UNITED STATES IS REQUIRED TO PAY LIBELANTS.

Since Arrow's negligence in sending its men to work in the hatch with knowledge of the dangerous condition existing there was the proximate cause of the injury and damage resulting, the United States is entitled to recovery-over of the full amount it has been required to pay libelants. It was not required to await the result of the action and then to institute separate suits for recovery-over against Arrow, but was entitled to proceed by impleading Arrow in the suits brought by libelants. Even if it were possible to regard the United States as jointly at fault, still in admiralty

recovery-over of one-half of the amounts required to be paid out may be had. The indemnity provisions of the contract between Arrow and the United States did not deprive the Government of its right of recovery-over and expressly gave the Government the benefit of Arrow's compensation insurance in respect of any amounts of compensation which were paid libelants.

1. **The United States is entitled to recovery-over of the full amount of the judgments in favor of libelants.**

Arrow's contractual duty to the United States to stevedore the vessel in a proper and workmanlike manner was broken when the stevedores were permitted to work in the hatch, despite the knowledge of Arrow's foremen that the hatch cover was improperly secured. Since this negligent breach of duty to the United States was the sole proximate cause of the damage and injury, the United States is entitled to recover from Arrow the full amount which it may be required to pay as a result. The relationship established by the stevedoring contract made Arrow responsible for its failure to exercise care to protect its employees while aboard the *Edgecombe* and rendered it liable to the Government for the negligence of its foremen, even though the Government as shipowner is liable to libelants because of the breach of its non-delegable duty to furnish them a safe place to work. As described in the *Restatement of Restitution*, Section 95, the circumstances of such liability are as follows:

Where a person has become liable with another for harm caused to a third person because of his

negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition.

This rule is supported by a number of cases at law.⁵ In admiralty it has been applied by this Court in *Seaboard Stevedoring Corp. v. Sagadahoc SS Co.* (9th Cir., 1929), 32 F. (2d) 886, and *Bethlehem Shipbuilding Corp. v. Joseph Guttradt Co.* (9th Cir., 1926), 10 F. (2d) 769, 771. Cf. *The Lewis Luckenbach* (2nd Cir., 1913), 207 F. 66; *Pan-American Petroleum T. Co. v. Robins Dry Dock & R. Co.* (2nd Cir., 1922), 281 Fed. 97, 108, certiorari denied 259 U. S. 586; *Standard Oil Co. v. Robins Dry Dock & R. Co.* (2nd Cir., 1929), aff'g 25 F. (2d) 339; *Guy v. Donald* (4th Cir., 1907), 157 Fed. 527, 530.

The circumstances that structural defects, of which the stevedore knew or with reasonable inspection should have found, contributed to provide a situation in which the negligence of the stevedore's employees caused the accident does not affect the result. Thus in the *Seaboard* case, *supra*, a ship liable to a longshore-

⁵*Pfan v. Williamson*, 63 Ill. 16; *Chicago Railways Co. v. R. F. Conway Co.*, 219 Ill. App. 220; *Brooklyn v. Brooklyn City R. Co.*, 47 N.Y. 475; *Newell Bridge & Ry. Co. v. East Liverpool Traction & Light Co.*, 7 Ohio App. 241; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N.W. 698; *Interborough Rapid Transit Co. v. New York*, 237 App. Div. 612, 262 N.Y.S. 388, aff'd 262 N.Y. 612, 188 N.E. 88.

man because of the negligent way in which hatch covers were replaced and the unseaworthy condition of the king beam was held entitled to full indemnity from the stevedore contractor who replaced the hatch boards in a negligent manner so that the longshoreman was injured. In affirming a decree for the shipowner this Court said (p. 887) :

It is further suggested that appellee's officers, or some of them, were about the ship while she was discharging, but it is not contended that any one of them had knowledge that the board was improperly placed; indeed, the defense is that it was not so placed. We are aware of no rule under which the ship's officers should be required for appellant's benefit to exercise a high degree of vigilance to see that it performs a plain duty.

As this Court stated in *United States v. Wallace* (9th Cir., 1927), 18 F. (2d) 20, 21:

In going on the ship to do the work, and in using its tackle, the contractor had to take them as it found them. Upon it rested the primary duty to its servants to make proper inspection to see that both places and instrumentalities were reasonably safe.

So here, while the ship's personnel was aboard, unless they knew that Arrow's foremen, contrary to the agreement which had been previously reached, were working their men underneath the improperly secured hatch cover, they were not required to take special steps to see that the foremen performed Arrow's plain duty not to expose its men to the danger. *Standard Oil Co. v. Robins Dry Dock & R. Co., supra*;

The Susquehanna (E.D. N.Y., 1910), 176 Fed. 157, 158; cf. *Imbrovek v. Hamburg-American Steam Packet Co.* (D. Md., 1911), 190 Fed. 229, 232.

The United States is likewise entitled to full indemnity because such passive negligence as it might be guilty of in furnishing the hatch cover without a seaworthy and proper locking device was followed by the reckless conduct of Arrow's foremen Larsen and O'Shea, which was the proximate and dominant cause of the accident. That the conduct of Larsen and O'Shea in sending their men to work in the hatch without any inspection was dominant and proximate in causal effect and may properly be characterized as not merely negligent but reckless in the extreme appears clearly from their testimony (*supra*, pp. 13-15, 18-19). The conditions of such liability are described as follows in the *Restatement of Restitution*, Section 97:

A person whose negligent conduct combined with the reckless or intentionally wrongful conduct of another has resulted in injury for which both have become liable in tort to a third person is entitled to indemnity from the other for expenditures properly made in the discharge of such liability, if the other knew of the peril and could have averted the harm at a time when the negligent tort-feasor could not have done so.

The rule thus stated is supported by various cases at law.⁶ While no admiralty decision appears to have

⁶*Nashua Iron & Steel Co. v. Worcester Nashua R. Co.*, 62 N. H. 159; *Knippinberg v. Lord & Taylor Co.*, 193 App. Div. 753, 184 N.Y.S. 785; *Colonial Motor Coach Corp. v. New York Cen-*

passed upon the applicability of this rule, it is believed that the cases involving the contractual situation equally support its application. Cf. *Oceanic Steam Navigation Co. v. Cia. Transatlantique Espanola*, 134 N. Y. 461, 467.

That judgment was rendered against the United States in favor of the libelants does not establish as between the Government and Arrow that the latter may not be required to make the Government whole for any recovery awarded libelants. *George A. Fuller Co. v. Otis Elevator Co.* (1918), 245 U. S. 489; cf. *Washington Gas Light Co. v. District of Columbia* (1896), 161 U. S. 316, 327-328; *Fidelity & Casualty Co. v. Federal Express Co.* (6th Cir., 1938), 99 F. (2d) 681.

2. **Even if fault on the part of the ship could be held to have contributed to the accident, the United States is entitled to partial recovery-over.**

In the event that the Court should hold that the negligence of Arrow's foremen was not a supervening and dominant cause of the accident, but that the fault of the ship equally operated to cause the injury, the United States would still be entitled to a partial recovery-over under the federal maritime law.

The best formulation of the federal maritime law on the point is contained in the case of *The Tampico*

tral Ry. Co., 131 Misc. 891, 228 N.Y.S. 508; *Eastern Texas Elec. Co. v. Joiner* (Tex. Civ. App.), 27 S.W. 2d 917; cf. *Missouri, Kansas & Texas Ry. Co. v. Missouri Pac. Ry. Co.*, 103 Kan. 1; *Colorado & Southern Ry. Co. v. Western Light & Power Co.*, 73 Colo. 107, 214 Pac. 30; *Missouri, Kansas & Texas Ry. Co. v. Missouri Pac. Ry. Co.*, 103 Kan. 1, 175 Pac. 97.

(W.D. N.Y., 1942), 45 F. Supp. 174. There a longshoreman sued a barge owner for injuries caused jointly by the defective condition of the barge and the negligence of his fellow employees. Libellant was held entitled to recover the full amount of his damages from the barge owner and the barge owner, having been found equally at fault, was in turn allowed recovery-over to the extent of one-half against the libellant's employer. The Court said (pp. 175-176):

The libellant being free from fault is entitled to recover from Hedger, who by its negligence contributed to libellant's injuries, to the full extent of his damages. *The Hamilton*, 207 U.S. 398, 406, 28 S. Ct. 133, 52 L. Ed. 264; *The Atlas*, 93 U. S. 302, 23 L. Ed. 863. Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force. "The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. [Citation.] Whatever its origin, the admiralty rule in this country is well known to be the other way. [Citations.] * * *". *Erie R. R. Co. v. Erie Transportation Co.*, 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450. Nicholson having secured the payment to its employees of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., is immune from suits for damages resulting from libellant's injuries brought by the libellant or anyone in his right, according to the provision of Section 905 of the Act. But the right in admiralty to contribution

between wrongdoers does not stand on subrogation but arises directly from the tort. *Erie R. R. Co. v. Erie Transportation Co.*, supra, 204 U. S. page 226, 27 S. Ct. 246, 51 L. Ed. 450. The immunity given Nicholson by the statute from suits arising out of libellant's injuries furnishes no defense against Hedger's claim to contribution as between joint tort feorsors. *Briggs v. Day*, D.C., 21 F. 727, 730. In reason and principle decisions in collision cases, where under the Harter Act, 46 U.S.C.A. § 192, the owner of a seaworthy vessel is relieved of liability to its own cargo, seem to point the way for upholding the right to contribution in the instant case. See *Aktieselskabet Cuzco v. The Sucarseco, et al.*, 294 U. S. 394, 400, 55 S. Ct. 467, 79 L. Ed. 942, and cases cited.

In collision cases the rule is of long standing that in a both-to-blame situation the recovery of personal injury claimants against either party is to be divided equally in the adjustment of the damage. See esp. *Brooklyn Eastern District Terminal v. United States*, (2d Cir., 1932), 54 F. (2d) 978, 980, reversed on an unrelated point 287 U. S. 170.

Again, *Barbarino v. Stanhope* (2d Cir., 1945), 151 F. (2d) 553, reversed a District Court decree dismissing the petition impleading a stevedore in a case where a longshoreman was injured because of a defective bolt and the shipowner sought to hold the stevedore for the negligence of its foreman in permitting libellant to expose himself to the dangerous condition. There, unlike here, the defective condition was unknown by the stevedore's foreman, yet the Court rec-

ognized that liability-over would exist, for the Court said (p. 555):

It was possible to avoid all danger at that time by merely warning the men to get out of the way. It is true that it was most uncommon for a boom to fall; but it was not unknown, and it would not have delayed the work for more than a few seconds to give the necessary warning and to see that it was obeyed. Considering that if it did fall, the men would be most gravely injured or killed, we cannot excuse the failure to protect them by so simple a means.

In the instant case, as we have shown *supra*, the reckless conduct of Arrow's foremen did not merely contribute to the accident but, having regard to the agreement reached that Arrow's men would not work underneath the improperly secured hatch cover, amounted to such reckless conduct on the part of Arrow's employees as to constitute a supervening and dominant cause which entirely cut off the fault of the ship in failing to have a seaworthy and proper locking device on the hatch cover.

The immunity of Arrow from direct suit by libellants does not destroy the right of the United States to partial recovery-over any more than to total recovery-over. The law is settled in that sense as regards the effect of the New York Compensation Act. *Westchester Lighting Co. v. Westchester Small Estates Corp.*, 78 N.Y. 175, 179; 15 N.E. (2d) 567; *Burris v. American Chicle Co.* (2d Cir., 1941) 120 F. (2d) 218, 222. And with substantial unanimity the

District Courts have followed the same rule in respect of the Longshoremen's Act. *The SS Samovar* (N.D. Calif., 1947), 72 F. Supp. 574, 588; *Rederii v. Jarka Corp.* (D. Me., 1939), 26 F. Supp. 304, 305, app. dismiss. 110 F. (2d) 234; *Barbara v. S. Ransom, Inc.* (S.C.N.Y.), 1948 A.M.C. 1483, 1485, 79 N.Y. Supp. (2d) 438; *The Tampico, supra*; *Green v. War Shipping Administration* (E.D. N.Y., 1946), 66 F. Supp. 393; *Severn v. United States* (S.D. N.Y., 1946), 69 F. Supp. 21.

It would seem that there could be no doubt on the point. The Government's right of liability-over is not derivative but original. It does not depend on any right of libelants against the employer. *The Tampico, supra*; cf. *Erie R.R. Co. v. Erie & Western Transportation Co.*, (1912), 204 U.S. 220, 225-226. The situation is identical with that arising under the Harter Act where the owner of a seaworthy vessel is relieved of liability to its own cargo, but must respond to the claim for liability-over of another vessel in a "both to blame" collision situation. *The Chattahoochee* (1899), 173 U.S. 540; *Aktieselskabet Cuzco v. The Sucarseco* (1935), 294 U.S. 394. Compare the situation formerly resulting from the fellow servant rule (*Briggs v. Day* (S.D. N.Y., 1884), 21 Fed. 727, 730), and still resulting from the giving of a release (*Jones v. Waterman SS. Corp.* (3d Cir., 1946), 155 F. (2d) 992, 1001).

3. The contract did not deprive the United States of its right to recovery-over and expressly gave the Government the benefit of Arrow's compensation insurance.

Arrow has contended throughout these cases that it is relieved of all liability to the United States by reason of the indemnity clauses of the contract which provide:

(b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the negligence or wrongful acts or omissions of the Contractor's officers, agents or employees or through fault of its equipment or gear, subject, however, to the following limitations and conditions:

* * * * *

(2) The Contractor shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government * * * nor shall the Contractor be so responsible for any such loss or damage resulting from default of ships' or other gear supplied by the Government.

We believe, however, that the language of these clauses is plainly not designed to alter the result reached in their absence, but on the contrary, merely restates the rules of the federal maritime law.

It is obvious that the clauses refer only to cases involving the exclusive fault of the contractor or the Government, providing that where either is at fault he shall bear any loss or damage resulting. Applying the same principle, we submit that the clauses contemplate that if it should be found that

the fault of both the contractor and the Government contribute, the loss or damage resulting shall be divided in accordance with the rules prevailing in the absence of any contractual provision. Accordingly, we submit that if this Court shall hold that the reckless conduct of Arrow's foremen in sending its men to work in the hatch was the sole and proximate cause of the falling of the hatch cover and the resulting injuries, then Arrow is required under clause (b) to fully indemnify the United States. On the other hand, if it found that the negligence of the ship's personnel as well as that of Arrow's foremen contributed to cause the accident, then the loss or damage should be divided and the United States held entitled to recovery-over against Arrow for one-half of the amount recovered by libelants to their own use.

Nor can it be successfully maintained, as appears to have been thought by the Court below, that the unseaworthy condition of the locking device for securing the hatch cover is a default of "ships' or other gear supplied by the Government" within the meaning of clause (2). It is obvious from the context, no less than from general usage, that the expression "ships' gear" is employed in its ordinary meaning as referring to cargo-handling gear as provided for in clauses (H) and (I) of Article 1 of the contract, which make express provision as to ships' gear. These clauses provide that "The vessel to be loaded or discharged by Contractor shall be equipped with the usual and ordinary cargo-handling gear in proper operating condition," and state that "the expression 'usual gear and equipment' used herein is defined as any and

all gear and equipment (except fork lift trucks, pallet boards and cranes) ordinarily used and employed by Contractor in the San Francisco Bay area in the loading and discharging of cargo." It goes without saying that only the plainest of language should be allowed to operate to relieve Arrow of the liability to which it would otherwise be subject under the federal maritime law and against which it particularly undertook in the contract to insure. Any different interpretation would merely result in a wind-fall to the insurance carrier involved and that would clearly be the result here if the expression "ships' gear" is broadened to include parts of the ship, such as hatch covers and their fittings. Moreover, it seems plain that even if applicable, the clauses relating to defective gear are subject to an implied exception in cases like the present where the contractor is negligent in the use of the gear furnished by the Government.

The insurance aspect of the case is important not only in this connection but also in respect of the action of the Court below in permitting recovery against the United States of the amounts which libelants had already received at the hands of Arrow and its compensation underwriter. While it is only in the *Williams* case that the Court below went so far as expressly to declare a lien in favor of Arrow for the amount of \$1,855.49 on account of such payments (Wms. R. 60), recovery was equally allowed libelant in the *Mitchell* case without deduction of the compensation payments amounting to \$1,282.41 which had already been received (Mehl. R. 21) and no pro-

vision was made denying to Arrow a lien on the amount of such recovery. This is in clear violation of the clauses of the contract expressly providing that:

(a) The Contractor shall procure and maintain at all times during the continuance of this agreement a policy or policies of insurance with underwriters to be approved by the Contracting Officer, insuring the Contractor against liability for injury to or death of any person or persons to an amount not less than \$250,000.00.

* * * * *

(4) Notwithstanding any other provision of this contract, the Contractor agrees to waive any right of reimbursement for loss or damage of any kind or character which it may have against the Government under any provision of this agreement if said loss or damage is covered by insurance and Contractor has collected or may collect for said loss or damage from the insurance company. The Contractor further agrees to have attached to and made a part of all insurance policies issued pursuant to this agreement on operations thereunder a rider by the terms of which the insurance company agrees to waive any and all rights of subrogation which it may have against the United States by reason of any payment under said policy.

These provisions clearly apply in the situation prevailing here and prevent any indirect recovery by Arrow, through the device of a lien, of those parts of the judgments recovered by libelants to which Arrow and not the libelants is beneficially entitled. Accordingly, since these amounts have already been in-

cluded in the judgments in favor of libelants, they must also be awarded to the United States by way of recovery-over against Arrow.

We submit, therefore, that the United States is entitled to recovery-over against Arrow of the full amount of the decrees in favor of libelants. But even if it should be held that the fault of the ship's personnel contributed equally to the accident, still, we believe, the United States is entitled to recovery-over against Arrow of the amounts of the compensation payments plus one-half of the balance of the decrees awarded libelants in the Court below.

CONCLUSION.

For the foregoing reasons we submit that the decision of the Court below should be reversed and the United States awarded a decree for recovery-over against appellee Arrow Stevedoring Company.

Dated, November 12, 1948.

Respectfully submitted,

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Nos. 11,519 and 11,880

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

On Appeals from the District Court of the United States
for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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Nos. 11,519 and 11,880

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

UNITED STATES OF AMERICA,
Appellant,
vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

On Appeals from the District Court of the United States
for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

STATEMENT OF PLEADINGS AND JURISDICTION.

These consolidated appeals concern two final decrees entered by the United States District Court for the Northern District of California, Southern Division, against the United States and in favor of the respective libelants in two separate libels. Appellee

Arrow Stevedoring Company (hereinafter called "Arrow"), which had been impleaded as a respondent in each action by the United States (hereinafter called "the Government") was dismissed. The cases arose out of the same accident but resulted in two separate and distinct trials.

The first case (Williams) was tried before the Honorable Judge Michael J. Roche and a decree was rendered in favor of the libelant and against the Government, and in favor of the impleaded-respondent Arrow. The Mitchell case, which was assigned for trial to the Honorable Judge Louis B. Goodman, was tried, by stipulation, before both Judge Goodman and Judge Roche, sitting jointly. It was further stipulated between the parties that the entire record of the Williams case would be considered by the Court in the Mitchell proceedings.¹ The Government was permitted also to introduce additional evidence in the Mitchell case.

In each case exceptions were filed alleging that Arrow could not properly be joined as a party, since it had provided compensation coverage under the Longshoremen & Harbor Workers' Compensation Act, 33 U.S.C.A. 901-950, and that by reason of Section 905 of said Act, Arrow's exclusive liability for injuries sustained by any of its employees was limited to com-

¹To avoid confusion, the same abbreviated references to each case, when referring to the Record will be used as were adopted by the Government in its brief. Reference to the Record in the Williams case, No. 11,519, will hereinafter be designated as "Wms. R." and in the Mitchell or Reite case, No. 11,880, as "Mehl. R."

compensation and medical benefits which benefits it had provided in both cases. The exceptions in each case were overruled, whereupon answers were filed by Arrow denying liability and alleging payment of certain compensation and medical expenditures under the said Longshoremen's Act and praying for reimbursement in each case to the extent of such payments, a lien claim having been filed in the Williams case, but not in the Mitchell case. A decree was entered in the Williams case in favor of libelant and Arrow and against the United States, and a lien was allowed Arrow to the extent of its payments of compensation and medical expenditures. In the Mitchell case a decree was entered in favor of libelant and against the United States and in favor of Arrow. The Government appealed in both cases only from the decrees in favor of Arrow. No appeal as to either of the decrees in favor of libelants was taken by the Government.

Both causes, on motion of the Government, were consolidated for the purpose of presentation of the appeals.

STATEMENT OF THE CASE.

It becomes necessary to supplement the Statement contained in the Government's brief from which certain relevant portions of the evidence have been omitted.

(a) **The Stevedoring Contract.**

It has not been made clear in the Government's brief that the provision of the stevedoring contract (Respondent's Exhibit B, Wms. 265)³ upon which the Government relies as the basis for its assertion that Arrow agreed to "waive any right of reimbursement for loss or damage", is a part of the limitations and conditions relating to Section (c) of Article 26 under the heading "Liability and Indemnity". The said Section (c) deals exclusively with operations involving "the loading, discharging, handling, presence or proximity of ammunition, explosives, gasoline and other inherently dangerous cargoes." It is further provided that special consideration is to be given to the contracting stevedore under this particular type of cargo. Certain limitations are then provided with respect to this particularly hazardous type of stevedoring, among which is the limitation, *supra*, set out by the Government as an isolated clause in support of its claim that the Arrow has waived its right of reimbursement. The Government's Statement fails to include the further provision under this section whereby Arrow is held harmless by the Government for any loss or damage caused by Arrow's negligence. This would clearly relieve Arrow of any liability. At any rate, the evidence is undisputed that the work being done at the time of the accident was not the hazardous type above specified. The job had to do with discharging cases of empty cartridges. (Wms. R. 290.)

³For pertinent provisions, see Part I of the Appendix hereto.

It is not true as claimed by the Government that "by reason of the duties which Arrow had undertaken and the terms of its contract, the United States was entitled to recovery-over, in whole or in part, for any liability imposed upon the Government in favor of the libelants." By the very terms of the said contract it is provided that Arrow "shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government * * * Nor shall the contractor be so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government." (Respondent's Exhibit B, Wms. 265.)²

(b) The Evidence As To Negligence and Unseaworthiness.

Alf Larson, the gang foreman of the crew in which Williams and Mitchell were working at the time of the accident, testified that as a rule the Navy opened the hatches and rigged the gear (Wms. R. 161-162) and that the day before the accident the Navy petty officer (the Government's representative in charge aboard the vessel) asked him if his gang was going to work the No. 4 hatch that night so he could "get ready and open up the hatch and get it ready" and that Larson told him he thought so, but to "go and see the walking boss." (Wms. R. 163.) Larson's gang quit working that day (the day before the accident) at

²Since the Government in its brief has omitted certain relevant portions of the Stevedoring Contract, the full provisions of Article 26, designated under the heading "Liability and Indemnity", are set forth in the attached Appendix as Part I thereof.

6:00 P.M., about two hours after this conversation. (Wms. R. 162.) Just before his gang started working again the following morning at 7:00 A.M., Larson looked down into No. 4 hatch, which was open (Wms. R. 165) and "everything seemed to be safe" (Wms. R. 164), whereupon he ordered the men to go to work. No cargo had been removed from this hatch prior to the accident. (Wms. R. 165.) A skow was lowered into the hatch and no part of it or the falls touched the hatch cover. About five minutes thereafter, as a result of the possible vibration caused by the vessel's striking the dock due to the wash of a passing vessel, Larson saw the hook on the forward end of the hatch door slip, and yelled down to the men "Look out". (Wms. R. 167-168.) Before the men could get clear the hatch door fell upon two of the stevedores. No member of this gang had rigged the falls or raised the hatch cover. (Wms. R. 168.) After the accident when the tank tops had been lashed together by the Navy crew, Larson noticed that the after hook on the hatch cover was bent (Wms. R. 181) and that there was no pin to lock the forward hook. (Wms. R. 182.) So far as Larson was concerned, this type of locking device was new, and he had never used a similar one before. Previously they had "always used a bolt or a shackle". (Wms. R. 183.)

The Government produced as a witness Herbert Carnes, Boatswain's Mate Second Class, who was purportedly on the vessel at the time of the accident, but who could not state whether or not he had talked with Larson. (Wms. R. 211.) Carnes admitted that it was

difficult to lock the hooks on the hatch door, since it was necessary to climb on a box or use a bar or broom handle to reach the hooks, none of which equipment was readily available. (Wms. R. 254-255.) Carnes also testified that Navy personnel was available all during the night preceding the accident to do any necessary work on the ship. (Wms. R. 221.)

The Government also called as a witness Claude Bowers, who was the foreman in charge of the stevedores working on the shift just prior to the accident. He testified that sometime after midnight, about 1:30 or 2 A.M., he went to one of the Navy officers and asked him to retrim the rigging for the offshore tank (where the accident subsequently occurred) because the cover was not in proper position (Wms. R. 281), the rigging was not adequate, and the pins in the locking device were bent and would not fit into position (Mchl. R. 54-55); that this Navy officer, who was in charge of the particular hatch, informed him that he could not get the work done at that time, but would "get it fixed as soon as he had the men available". (Mchl. R. 59.) (Carnes said he had men available all night.) The Navy did not give Bowers any instructions as to how to secure the hatch door (Mchl. R. 59), and there was no equipment with which they could have lashed the doors. (Mchl. R. 61.) A person standing at the top deck could not tell whether the dogs or hooks were properly locked or whether the pins were in position (Mchl. R. 62), but in any event, the hatch appeared to be all right when his gang left the hatch door to work on the other side. (Mchl. R.

67-68.) He further testified that the general rule on Navy ships is for the Navy to rig the gear and that "the stevedores are not supposed to touch it" and that it was not the job of the stevedores to lash the tank tops, but that "that was the Navy's job". (Mchl. R. 72.) Also, that there was nothing with which to lash the covers. (Mchl. R. 71.) Bowers further testified that there was no exact practice by stevedore foremen as to the extent of their inspection of hatches prior to sending men to work; that there are many things which would occupy the time of the foremen, and that it would be proper to look at the hatch door from the top deck. (Mchl. R. 86-88.) The night gang quit and left the ship at 6 A.M. and Bowers left shortly before 7 A.M.

Another member of the night gang of stevedores, one Anzulovich, was produced by the Government and testified that he helped open the hatch door and that he "thought it was safe by itself" and that he never thought it would come down. (Mchl. R. 92.)

Joseph Kokicks, another stevedore on this gang, testified for the Government that he helped open the hatch door and put the hooks on. (Mchl. R. 95.) In no part of his testimony did this witness say that the condition of the hatch door appeared to be unsafe prior to the time the door came down.

Martin O'Shea, foreman of the day gang, testified as a witness for the Government and denied that Bowers had any discussion with him concerning the hatch door. He stated that when a hatch door of this type

is up, it is considered to be safe. He further testified that "they opened it in the day-time, because in the day-time I seen them; the Navy did it; I don't know whether they did it that night or not." He later stated, however, that "it was open in the morning when I came in" and that he did not know who opened it. (Mehl. R. 101.) In any event, he saw nothing to indicate danger to his men and therefore directed the men to go ahead with the work. No special or detailed examination is made in such instances, unless something is brought to his attention. (Mehl. R. 102.) On Navy ships, as distinguished from commercial vessels, Navy personnel does the checking of appliances and equipment and there is very little done by the stevedores in this respect. (Mehl. R. 103.) It is therefore not customary or even permissible for the stevedores to check and make inspections of such equipment and appliances.

SUMMARY OF THE ARGUMENT.

(1) The sole proximate cause of the accident was the unseaworthiness of the vessel in that the port No. 4 hatch door was defective due to the bent condition of one of its hooks and the absence of a locking pin.

(2) There was no negligence on the part of Arrow or its employees proximately causing or contributing to the happening of the accident.

(3) The Findings of Fact and Conclusions of Law are fully supported by substantial evidence and should not be disturbed on appeal.

(4) The Government's appeal from the trial Court's decrees is nothing more than an attempt to have the cases heard *de novo*, which procedure is not available in view of the fact that the oral testimony of all the witnesses was heard by the trial Court and its decrees are supported by substantial evidence.

(5) The stevedoring contract provides that Arrow shall not be liable for loss or damage occasioned by negligence of the Government's employees or unseaworthiness of its vessel; consequently, Arrow is not liable-over to the Government since there is substantial evidence in the record that the sole proximate cause of the accident was the vessel's unseaworthiness and negligence of the Government's employees in failing to correct such condition after due notice thereof.

(6) The Longshoremen & Harbor Workers Compensation Act prohibits recovery against employer Arrow other than for compensation and medical benefits under the provisions of said Act. Arrow's liability either to its employees or to "anyone" otherwise entitled to recover is limited exclusively to the benefits prescribed by said Act.

(7) Arrow cannot be held liable-over to the Government in any event, since the Government failed to appeal from the decrees in favor of libelants. If, as contended by the Government, the negligence of Arrow was the sole proximate cause of the accident, neither the Government nor Arrow could be held liable. The Government's failure to prosecute appeals from assertedly unlawful decrees against it defeats any possible claim for recovery-over against Arrow.

I.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE UNSEAWORTHINESS OF THE VESSEL AND NEGLIGENCE OF GOVERNMENT EMPLOYEES IN FAILING TO CORRECT THE DEFECTIVE HATCH COVER AFTER NOTICE THEREOF.

There is ample evidence in the record showing that the cover of the No. 4 hatch of the vessel was defective in that the locking devices failed adequately to lock the hatch door in an open position. The stevedores of the night shift opened the hatch cover and secured it as well as they could. The foreman of that gang advised the Navy officer, the Government's supervising officer aboard the vessel, of the fact that the pins to secure the hatch door were "bent and wouldn't go in" and that the rigging had not been properly set up by the Navy crew. (Mchl. R. 54, 55.) The Navy officer assured the stevedore foreman that he would have the condition fixed as soon as he had the men available. Carnes, the Navy officer in charge of the work at this hatch, testified that he had men available all night. (Wms. R. 221, 249.) However, the evidence is uncontradicted that the Government allowed the hatch cover to remain in this condition from approximately 1:30 o'clock in the morning until shortly after 7:00 A.M. of that day when the accident occurred. No effort whatsoever was made by the Navy to correct this defective condition until after the accident occurred. The gang of stevedores which came to work at 7:00 A.M. on that morning, finding the hatch open and in a position to permit them to commence their discharging operations, started to work in the usual and customary manner. Through no fault on the part of the

stevedores, the hatch cover fell because of its defective condition and possible vibration of the vessel hitting the dock, as the result of the wash from a passing vessel. (Wms. R. 168.)

There was no duty on the part of the stevedores, through custom, agreement or law, to make any inspection of the area in which they were working other than the observations made by them and their foreman. The evidence is uncontradicted that on Navy ships the Navy personnel check the gear, equipment and appliances and that no detailed inspection is made by the stevedores or allowed by the Navy. (Mchl. R. 103-105.) There was certainly no contributory negligence on the part of the stevedores or their superiors in attempting to carry on their work under the conditions which were presented to them. There was no notice to the foreman or any members of the gang of any inherently dangerous condition which would have prevented reasonable men under the same circumstances from proceeding with their work. This particular hatch door was of a new and unusual type, unfamiliar to the stevedores, who had no prior experience or knowledge concerning this particular appliance. (Wms. R. 183.)

The gang on the prior shift, that is the night gang, which worked until 6:00 A.M. of the day of the accident, was required to do no work at that particular part of the hatch after opening the hatch doors and notifying the Navy of the defective and improper conditions and after having been assured by the Navy that these conditions would be promptly

remedied. No attempt whatsoever was made by any of the Government employees to correct these conditions until *after* the accident occurred. Immediately following the accident, the Navy secured the hatch doors by means of a turnbuckle and securely fastened the hooks with pins within a matter of a very few minutes, (Wms. R. 234, 258), all of which could and should have been done by the Navy personnel prior to the unfortunate accident. Herbert Carnes, who was the Navy man in charge of this work, testified that he had men available "at any time of the night" (Wms. R. 221, 249) and yet the unseaworthy condition of the hatch door was permitted to remain unrepaired for a period of over five hours from approximately 1:30 A.M. (Mchl. R. 54), when the conditions were called to the attention of the Navy, until shortly after 7:00 A.M. when the accident occurred.

Although Government counsel at this point of the Williams trial stated there were alleged written orders and regulations with regard to purported duties of the stevedore crew to lift the hatch doors, such alleged evidence was never produced either at the Williams trial or in the Mitchell case, tried ten months later, despite counsel's statement that "the written orders can be made available." (Wms. R. 226.) An effort was made by Government counsel to show, through Carnes, that the dogs and pins were in good working condition immediately after the accident and that, consequently, there was nothing defective about the hatch door, the dogs or the pins. (Wms. R. 234.) The trial Court obviously chose to disbelieve such testimony in view of

its complete variance with the facts. It is of some significance to observe that the Government subsequently abandoned this theory.

Government counsel seek, unsuccessfully, to explain away the glaring conflicts in the testimony of their own witnesses, particularly that of Bowers and O'Shea, who disagreed as to whether or not certain conversations were held. The position taken by the Government, consequently, is that:

(1) Whether or not Bowers told O'Shea of the condition of the hatch door, "Arrow is responsible for the knowledge which it gained through Bowers, its night walking boss, even though he failed in the performance of his duty to Arrow in communicating such knowledge to O'Shea, its day walking boss", and,

(2) "Even if Bowers' testimony is totally disregarded, still the testimony of Arrow's day gang boss, Larson, at the Williams trial, and Arrow's day walking boss O'Shea at the Mitchell trial", establishes that "Arrow is chargeable with their negligence in failing to make any inspection whatsoever with a view to ascertaining whether or not the hatch cover was in a safe condition before they sent their men to work beneath it." (Government's brief p. 28.)

As to the first point, there was no duty on the part of Bowers to convey any knowledge to anyone after being assured by the Navy officer in charge of the hatch that the conditions would be corrected. Bowers removed his gang from that part of the vessel and, after having received the assurances he did, he cer-

tainly had the right to assume that those who were responsible for the correction of such conditions would carry out their promise and absolute duty to do so. There was a period of five and one-half hours during all of which time the necessary Naval personnel was available to correct the defective conditions. During the evening prior to the accident some of the Navy crew had been allowed to go ashore. However, according to Herbert Carnes, the Navy officer in charge, "the remaining men aboard were there to handle any ship work coming up during the night." (Wms. R. 221.) It would seem clear, therefore, that the vessel's supervising officer was advised of the defective condition, that he promised to make the required corrections and that the necessary men were available to carry out such work. While there is some testimony concerning the alleged unavailability of a Navy crew on the evening before the accident, the Government's own witness, Herbert Carnes, who testified that he was in charge of the work to be done at the hatch on behalf of the Navy, testified that he had men available all that evening to do any work on the ship that was required to be done. (Wms. R. 221, 249.)

As to the second point—that Arrow is chargeable with the alleged negligence of the stevedore foremen in "failing to make any inspection whatsoever with a view to ascertaining whether or not the hatch cover was in a safe condition"—it is respectfully submitted that such statement is not supported by the evidence. Larson testified that he looked at the hatch from the top of the deck, which was the usual and normal ob-

servation on Navy ships, and "everything seemed to be safe." (Wms. R. 164.) O'Shea also testified that he considered the hatch to be safe, since it was open, and in line with the custom on Navy ships, when the hatches were open they were presumed to be safe to work in; also that he had noticed that the Navy opened the hatch in the day-time but did not know whether they opened it during the night or not. (Mehl. R. 101.) As to the matter of detailed inspections, O'Shea, the Government's witness, testified as follows:

"CROSS-EXAMINATION

By Mr. Kay:

Q. Mr. O'Shea, had you worked on a number of Navy ships?

A. Oh, quite a few.

Q. And on all of these does the Navy allow you to go around and check everything on the ship?

A. No, they check themselves. Everything is checked by the Navy.

Q. Yes, and there is very little you do——

A. Very little.

Q. Just a minute. There is little you do in the way of going around checking every particular piece of equipment on Navy ships. Isn't that right?

A. That is right.

Q. The Navy does all that?

A. Yes.

Q. They set up the rigging for you. They generally open the hatches for you?

A. They do.

Q. And then you do not go around to see if every hook is in place and every pin is in, do you?

A. Surely not." (Mehl. R. 103-104.)

It follows, therefore, from the testimony, particularly that of the Government's own witness, Michael O'Shea, that Arrow's foreman and his men did all that was customary and permissible on Navy ships in the way of checking equipment. They looked at the hatch door and it appeared to be safe to them and, accordingly the stevedores began to carry out their work.

At this point we desire to comment on the Government's rather absurd argument concerning Arrow's asserted burden of offering the testimony of its employees. In this regard, it is stated at page 30 of the Government's brief:

"The testimony of any of its employees was elicited solely as a result of certain of them having been called by libelant and the Government. Arrow itself compelled the other parties to call its people as adverse witnesses."

It should be perfectly clear to anyone that as a matter of procedure Arrow, the impleaded respondent, had no burden, indeed had no right, to produce witnesses until after the libelant in each instance had put on his case followed by evidence which the Government, as the respondent, was required to offer as a defense to the libel. Arrow, having been impleaded as a respondent by the Government, would only be required to *meet* evidence adverse to it. Consequently, Arrow did not and could not have called any witnesses until the other parties had proceeded with their evidence. If the Government chose to call as its own witnesses certain employees of Arrow whose testimony

at the trials proved to be unfavorable to the Government, there can surely be no valid criticism against Arrow in this respect.

On the question of a stevedore contractor's asserted duty to check the ship's appliances, certain cases are set forth on page 29 of the Government's brief. None of the cases cited involves a vessel owned and operated by the United States Navy. According to the uncontradicted evidence, the practice is for the Navy crew to make all the necessary inspection on Navy ships. The case of *Grillo v. Royal Norwegian Government*, 139 Fed. (2d) 237, had to do with an injury to a stevedore in the employ of a stevedoring company, who fell as the result of a defective Jacob's ladder which he was using to go ashore to get a crow-bar on the dock. The Court held, with regard to the vessel's affirmative duty to provide the stevedore a safe Jacob's ladder for use in getting to and from the vessel (p. 238), as follows:

"Hence the case comes down to whether there is such an affirmative duty in the premises. Unless there is some reason for making an exception, the situation was the conventional one, which used to be called that of an 'invited person' and which is now called that of a 'business visitor'. (Restatement of Torts, Section 343, Comments (a) (e) and (f)). The work going on was in the ship's interest—loading her for a prospective voyage in search of profit—and the libelant was obliged to mount the ship's side in order to perform it. * * * We hold, therefore, that the ship in the case at bar did owe such duty to the libelant and that she failed to discharge it."

The decree in favor of the libelant and against the vessel was affirmed. We are unable to see how this case could possibly support the Government's position. It is clear that the Court held that the vessel owed an "affirmative duty" to provide a safe and seaworthy Jacob's ladder to the "business visitor" (the stevedore). Likewise, the Government owed an "affirmative duty" to provide a safe and seaworthy hatch door to the "business visitors" (i.e. the stevedores) in the present proceedings.

The Government further argues that the case of *Seaboard Stevedoring Company v. Sagadahoc SS Company*, 32 Fed. (2d) 886, is applicable. Emphasis is placed on the Court's statement that the ship's officers are not required, for the benefit of stevedores, "to exercise a high degree of vigilance to see that it performs a plain duty". The *Sagadahoc*, however, did not involve the immediate contracting stevedore, whose employee was injured, but was an action for recoupment against a prior stevedore company at a different port who had not properly replaced the vessel's hatch boards. This Court's pronouncement that the ship's officers were not required "to exercise a high degree of vigilance to see that it performs a plain duty" referred to the prior stevedore company, not the employer of the injured man. As this Court is aware, the *Sagadahoc* was held liable to a stevedore injured in Portland as a result of improperly placed hatch boards which had been last handled by stevedores in San Francisco. The libelant, Freshley, sought and obtained recovery from the *Sagadahoc* based upon

the unseaworthy condition of her hatches. His injury was suffered under circumstances similar to the matter at bar, in that both the *Sagadahoc* and the *Edgecombe* were unseaworthy, the only difference in the two cases being that the Government cannot claim here that some third party at a different port was responsible for its defective and unseaworthy gear. Moreover, as indicated at page 36 of the Government's brief, recovery was allowed to the *Sagadahoc* against the stevedore company which created the unseaworthiness because the vessel's officers had no knowledge of the hazard. From the verbiage of the opinion of the Court in that case, it is clear that had notice of the defective condition been brought home to the ship's officers, no recovery could have been had against the first offending stevedores.

As we have elsewhere shown, it is manifest that the vessel's officers in the instant case had full knowledge of the defective condition of their vessel and adequate time and available personnel to make the necessary corrections. Having failed to do so, the ship's officers were clearly negligent and the injury to Williams and the death of Mitchell were solely and proximately caused by the unseaworthy condition of the vessel and the negligence of its officers.

II.

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE.

There is no basis for the Government's complaint that the Findings of Fact and Conclusions of Law as ultimately found by the trial Court were, instead, the Findings of Fact and Conclusions of Law of the successful parties. Unless it can be shown that the findings of fact are not supported by substantial evidence, it must be presumed that the findings of fact, as well as the conclusions of law, which were entered in these cases, were carefully considered and adopted by the trial Court and, consequently, should be allowed to stand.

The authorities set forth by the Government in its brief at page 27 do no more than lay down the broad proposition that findings of fact should be based upon some substantial evidence. As stated in one of these authorities, *The Severance*, 152 Fed. (2d) 916, 918, "This practice (adoption *in toto* of proposed findings and conclusions) is not to be commended. It has been condemned by many courts as not living up to the provisions of Admiralty Rule 46½; 28 U.S.C.A. following Section 723 * * *." The Court went on to add, however, "We do not hold that the practice affords a ground for reversing the decree of the District Court."

In another case cited by the Government, *Hutchinson v. Dickie*, 162 Fed. (2d) 103, 106, findings of fact were criticized since they were shown to be "intermixed findings of both law and fact". But the Court

finally treated them as conclusions of law. With respect to definite findings of fact, it was stated that "the Court saw the witnesses and heard their testimony and this finding must prevail", citing *Peterson Lighterage & Towing Corp. v. New York Central R. Co.*, 126 Fed. (2d) 992.

The case of *Great Atlantic & Pacific Tea Company v. Brasileiro*, 159 Fed. (2d) 661, 665, is merely a holding by the Court that "the finding of negligence was not a finding of fact, which must be 'clearly erroneous' to be subject to review." Also in the case of *Johnson v. Kosmos Portland Cement Company*, 64 Fed. (2d) 193, 195, it was ruled that a particular finding of the Court below that respondent had failed to use reasonable care was "a mixed question of law and fact" and that where "the finding is of an ultimate fact, and the law applied reposes in the mind of the Court, it must be clear that the finding is at least a mixed finding of law and fact, as to which no presumption of correctness obtains." Nonetheless, the Court significantly held: "It is the rule in this and other Circuits that while an appeal in admiralty is a trial *de novo*, the findings of the District Court will be accepted unless clearly against the preponderance of evidence". (Authorities cited.)

Counsel for the Government argue that the Court's findings are "clearly erroneous and contrary to the evidence insofar as they purport to hold that the employees of Arrow were free from negligence". There is more than adequate support for the Court's findings in the record. The Government grasps at disconnected

straws in the testimony of one of its own witnesses, Claude Bowers, in an effort to establish that he, Bowers, was allegedly negligent in his asserted failure to point out the dangerous condition of the hatch cover to the stevedore boss on the succeeding shift. In this regard, it must be stated that Bowers' testimony, in many respects, was inconsistent and unreliable. The Court in both trials chose to disbelieve certain portions of the testimony of this Government witness, accepting other parts thereof. Although no testimony was elicited from Bowers at the Williams trial that he communicated with O'Shea, the walking boss on the day shift, the Government again produced him in the Mitchell trial and, at that time, offered such testimony. This was an obvious, though lame, attempt to bolster the Mitchell case with evidence which the Government apparently felt was the missing link in the Williams trial. Unfortunately for the Government, however, its witness O'Shea contradicted Bowers and testified there had been no such discussion.

The problem of determining the weight to be given to the testimony of witnesses who have testified orally is, of course, for the trial Court to determine, and the situation here presented is a rather clear example of why trials *de novo* are frowned upon by the Circuit Courts, since they, in considering an appeal, do not have the opportunity to see and hear the witnesses and, hence, are in no position to separate the chaff from the wheat. (The matter of trial *de novo* will be more fully discussed hereafter.)

Assuming that Bowers, some five and one half hours before the accident, had knowledge of conditions which would make it unsafe to work in the hatch at that time, the record is without conflict that he immediately communicated these facts to the Navy officer in charge of the hatch and no further work was done there by the stevedores. (Wms. R. 289); (Mchl. R. 54.) This Government witness further testified that the Navy officer informed him that the hatch conditions would be corrected. No instructions were given by the Navy as to how to secure the hatch door (Mchl. R. 59), and there was no equipment with which the stevedores could have lashed the doors. (Mchl. R. 61.) Bowers' gang left the vessel at 6:00 A.M. and, during the one hour interval between that time and the commencement of the next shift, no stevedoring work whatsoever was done on the vessel. Also, during this hour interval the Navy crew and officers were aboard. (Mchl. R. 77.) When the day gang came to work at 7:00 A.M., O'Shea's gang boss, Alf Larson, looked at the open hatch from the top of the deck and "everything seemed to be safe". (Wms. R. 164.) Other witnesses called by the Government also testified that the hatch looked all right to them. (Mchl. R. 92.) The record is without conflict that no detailed inspection or examination of the vessel or its appliances is made by stevedores or permitted by the Navy on Navy vessels, all such inspections being carried on solely by the Navy personnel. (Mchl. R. 102-103.)

The accident occurred without any contributing negligence on the part of either O'Shea or Larson, or any

of the stevedores, the hatch door having fallen because of the failure of its locking device to hold in the presence of vibration, possibly caused by the vessel's striking the dock due to the wash of a passing ship. (Wms. R. 168.)

The District Court's findings of fact being wholly supported by the evidence, it follows that said findings are not erroneous and therefore should, together with the Court's conclusions of law, stand in both cases.

III.

A TRIAL DE NOVO IS NOT AVAILABLE TO APPELLANT IN EITHER CASE, SINCE ALL WITNESSES TESTIFIED ORALLY BEFORE THE TRIAL COURT.

The witnesses in the Williams as well as in the Mitchell case appeared in person and testified orally. No evidence was heard by way of deposition. We respectfully suggest that this consolidated appeal, which involves only issues of fact is purely an attempt to have the causes heard *de novo* by this Honorable Court.

It is not believed that the Court should or will try these cases *de novo*. The rule appears to be well settled that the trial Court is in a better position to judge the credibility and to give weight to the evidence when all the testimony is adduced from witnesses personally present.

In the case of *Catalina-Arbutus*, 95 Fed. (2d) 283, Judge Denman of this Court stated:

“While this admiralty appeal is a trial de novo the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses, save one, and his deposition clearly sustains those heard. Ernest H. Meyer (9CCA), 1936 A.M.C. 1179, 84 Fed. (2d) 496, 501; *Silver Line et al. v. United States, et al.* (9CCA), 1938 A.M.C. 521.”

To the same effect is the case of the *City of New York v. National Bulk Carriers, Inc.*, 138 Fed. (2d) 826, wherein it was said:

“It appears to be impossible to convince the bar that we will disturb findings of fact as seldom in admiralty causes, as in any other. Whether there lingers a notion—never in fact justified—that because an appeal in the admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by over-setting findings of fact upon disputed evidence. In order to meet this persistence we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this Court.”

To the same effect are many other cases, including:

“*Heranger*”, 101 Fed. (2d) 953 (9CCA);
City of Cleveland v. McIver, 109 Fed. (2d) 69;
Commercial Molasses Corp. v. New York Tank B. Corp., 114 Fed. (2d) 248;
The S.C.L. No. 9, 114 Fed. (2d) 964.

This Court on June 16, 1947, in the cases of *Tawada v. United States*, 162 F. (2d) 615, spoke as follows on this precise point:

“(1) In an appeal in admiralty, where a substantial part of the evidence was heard in open court, the ‘correct rule’ is that the findings of the trial Court ‘are accompanied with a rebuttable presumption of correctness’. *Thomas v. Pacific S.S. Lines, Ltd.*, 9 Cir., 84 F. (2d) 506, 507, 508; *The Pennsylvanian*, 9 Cir., 149 F. (2d) 478, 481. And ‘where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.’ ”

This Court succinctly stated the rule in *Stetson v. United States*, 1946 A.M.C. 900, 155 Fed. (2d) 359 (C.C.A. 9th) and in *Bornhurst v. United States*, 1948 A.M.C. 53 (C.C.A. 9th) as follows:

“The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed.”

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellee and against appellant. A trial *de novo* is therefore not available to the Government.

IV.

IF, AS CLAIMED BY APPELLANT, THE NEGLIGENCE OF APPELLEE WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, NEITHER PARTY COULD BE HELD LIABLE AND APPELLEE ARROW IS THEREFORE NOT LIABLE-OVER TO APPELLANT UNITED STATES.

A rather amazing argument is made in the Government's brief, in support of its claim that Arrow is

liable-over to the Government for amounts required to be paid under the decree. In this respect, it is argued by the Government that since Arrow's negligence was the *sole proximate cause* of the accident "the United States is entitled to recovery-over of the full amount it has been required to pay libelants."

If, as claimed by the Government, the negligence of Arrow was the sole proximate cause of the accident, it is axiomatic that no decree of any kind could have been entered against the Government. In a tort case, liability cannot be fastened without fault. The Government, by failing to appeal from the decrees in favor of libelants, admits its responsibility to them. This fact naturally prompts the inquiry: what responsibility? The only possible answer is the responsibility for the Government's fault, viz.: the vessel's unseaworthiness, or negligence of its employees. As we have heretofore pointed out, if sole fault rested with Arrow, no recovery under any theory could have been had against the Government or, for that matter, against Arrow, whose liability to the libelants would be governed exclusively by the Longshoremen & Harbor Workers' Compensation Act, *supra*. We submit that the Government's satisfaction with and concurrence in the decrees against it and in favor of libelants, gives the complete lie to its written position as set forth in its brief.

Surely, appellant is not entitled to recovery-over from Arrow Stevedoring Company on any conceivable basis in view of the Government's failure to appeal as to the decrees in favor of libelants, in the face of its

claim that Arrow's negligence was the *sole* proximate cause of the accident. See *Desiano v. United States of America*, 1946 A.M.C., 544, where an injured stevedore claimed that his injury was the result of a defect in the ship's winch. It developed at the trial, however, that the accident was due to the improper operation of the winch by the stevedore and even though there may have been "some defect in the winch which would cause the draft to slip downward, it is obvious that this could have no causal relation to the subsequent behavior of the draft." The libel was accordingly dismissed, since it was shown that the sole proximate cause of the accident was the negligent operation of the winch. In *Shelton et al. v. Sea Shipping Company et al.*, 1947 A.M.C., 1528, a stevedore winch driver was fatally injured as the result of being struck by a fair-lead after the cable had parted due to sudden stress put on by the winch driver. In denying recovery to the executrix of the estate of the deceased, the Court held (p. 1537) " * * * all the plaintiff is required to show, in order to recover in this action, is that the SS *Robin Tuxford* or her appliances was unseaworthy. However, the plaintiff has failed in this requirement * * *". Since negligence in the operation of the winch was held to be the sole proximate cause of the accident, recovery was denied. See also *Braner v. Brooklyn Eastern Dist. Terminal*, D.C., 46 Fed. Supp. 302.

V.

THE STEVEDORING CONTRACT RELIEVES ARROW OF ALL LIABILITY UPON PROOF OF UNSEAWORTHINESS OF THE VESSEL OR NEGLIGENCE OF THE GOVERNMENT'S EMPLOYEES.

The stevedoring contract (Part I of Appendix hereto) clearly absolves Arrow Stevedoring Company from liability in any event, since that contract provides that Arrow shall not be responsible to the Government for any loss or damage resulting from an unseaworthy condition of the Government's vessels or from negligence on the part of any employee of the Government.

It is contended by the Government that the contract does not deprive the United States of its right to recovery-over and that, furthermore, it expressly gives the Government the benefit of Arrow's compensation insurance.

Article 26 of the contract is entitled "Liability and Indemnity". Section (b) thereof provides that the stevedoring company shall be liable to the Government for loss or damage "as a result of the negligence or wrongful acts or omissions of the contractors (Arrow) officers, agents or employees or through fault of its equipment or gear, *subject, however, to the following limitations and conditions: * * **" (Emphasis added.) One of these limitations and conditions is as follows:

"(2) The contractor (Arrow) shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government * * *. Nor shall the

contractor be so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government."

In the Government's brief at page 44, it is claimed that the language "default of ships or other gear supplied by the Government" does not cover appliances such as the hatch, hatch door and its locking devices, the unseaworthiness of which caused the accident herein. This contention hardly requires an answer. Bowers, a Government witness, testified that "gear" would "take in the tanks, too." (Mchl. R. 55.)

The term "gear" is defined by Roget's International Thesaurus as being synonymous with "equipment", "apparatus", "fittings", and "fixtures".

It is plainly obvious from the foregoing that the contract, which was formulated by the Government, provides for liability on the part of the contracting stevedore company where damage results from the negligence of its agents or employees, subject, however, to the limitation and condition that the contractor shall not be so responsible where the damage results from an act or omission of an employee of the Government or from a defect in its vessels or equipment supplied by the Government. It would be superfluous for the Government to insert these *limitations* and *conditions* unless it was intended to absolve the stevedoring contractor from liability in any case where the injury or damage was in any way caused or contributed to by negligence of the Government's employees or through fault of the vessel or its defective equipment. If this were not the intention, it would

have been entirely unnecessary and pointless for the Government to have included any such limitation for the obvious reason that if the damage were *solely* caused by the Government through its employees or through defective ships or equipment, the stevedoring contractor could not possibly, under the law, be held liable.

Liability on the part of the stevedoring contractor is, therefore, intended to be imposed only when its negligence causes damage or injury without intervening or concurring negligence on the part of the Government employees or by reason of a defect in the vessel or its equipment. In this connection it is well to note that the provision upon which we rely is a *limitation* and *condition* of and to the section which provides for liability on the part of the stevedoring company. Such a clear-cut condition and limitation would seem to dispel any claim of ambiguity as to the intention of the drawer (the Government) of the contract. Assuming that there is any ambiguity, or uncertainty, it is of course elementary in the law of contracts that, in seeking an interpretation of any such provisions, the courts strictly construe the language and resolve any doubt as to the true meaning and construction of the wording used, against the maker of the contract and in favor of the other party thereto.

See generally: 13 *Corpus Juris* § 516, p. 544.

Bijur Motor Lighting Co. v. Eclipse Machine Co., 237 F. 89;

Southern Railway v. Coca-Cola Company, 145 F. (2d) 304.

In the last cited case, the Fifth Circuit Court of Appeals held (p. 307) that

“When the words of a contract are ambiguous, it is a well-known and worthy maxim of our law that such ambiguities should be resolved against the person who drew the contract and selected its terminology and nomenclature.” (citing cases.)

See also: Sec. 1654 Civil Code of California.

Glen v. Bacon, 86 Cal. App. 58 where the ambiguity in the meaning of clauses in a lease was resolved in favor of the lessee, the lessor being the scrivener.

Coast Mutual Building-Loan Assoc. v. Security et al., 14 Cal. App. (2d) 225

where the court held that a clause in an insurance contract should be interpreted most favorably to the insured.

Earl Ranch v. Marchus, 60 Cal. App. (2d) 379 in which the court applied section 1654 of the Civil Code of the State of California, and ruled that:

“The language of the contract shall be interpreted most strongly against the party who caused the uncertainty to exist.”

In line with the general purpose of securing stevedoring services during the wartime and bestowing liberal conditions to encourage full assistance and cooperation, the Government undoubtedly desired and intended to relieve the stevedoring company of any responsibility for accidents caused or contributed to by some negligent act or omission of a Government employee or by an unseaworthy vessel. This can be the only logical and understandable reason for the

language selected and used by the Government in the stevedoring contract involved in these proceedings. We do not see any ambiguity.

As to the Government's claim that the contract gives it the benefit of Arrow's compensation insurance, we believe this assertion hardly requires an answer. Section (a) of Article 26 simply requires that Arrow shall maintain insurance coverage insuring itself against liability for injury or death and for property damage. Subsection (4) of Section (c)—set forth on page 7 of the Government's brief in such a manner as to give the impression that it refers to Section (b)—is clearly a provision requiring Arrow to "waive any right of *reimbursement* for loss or damage of any kind or character which it may have *against* the Government" where such damage is covered by insurance and where Arrow "has collected or may collect for such loss or damage from the insurance company." (Emphasis added.)

Arrow is not seeking "reimbursement" by reason of any right "against" the United States. Its lien claims are on the judgments which were entered in favor of libelants. Furthermore, the section relied upon is a limitation of and refers directly to section (c) which has to do exclusively with hazardous loading or discharging operations such as handling of "ammunition, explosives, gasoline and other inherently dangerous cargoes". (See Part I of Appendix hereto.) There is no dispute here as to whether the cargo being discharged was of such nature; it involved cases of empty cartridges. (Wms. R. 290.) If the

Government is entitled to rely on this section, then Arrow could not possibly be held liable-over to the Government, because there is a hold-harmless provision in favor of Arrow in the same section as follows:

“* * * the Government will hold the contractor (Arrow) harmless against any loss, expense (including expenses of litigation) and liability to third persons because of death, bodily injury or property damage or destruction or otherwise of any kind whatsoever, *irrespective of the negligence of the contractor, its agents, officers, servants or employees.*” (Emphasis supplied.)

Aside from the foregoing provision of the contract, Subsection (2) of Section (b), *supra*, clearly absolves Arrow of all liability in the premises.

VI.

INASMUCH AS ARROW SECURED COMPENSATION COVERAGE UNDER THE PROVISIONS OF THE LONGSHOREMEN AND HARBOR WORKERS' COMPENSATION ACT, IT CANNOT BE HELD LIABLE-OVER TO THE GOVERNMENT.

Arrow, having secured compensation coverage under the Longshoremen & Harbor Workers' Compensation Act cannot be held liable-over to the Government. There is no dispute in the record concerning the fact that Arrow at the time of the accident had complied with the terms of the said Longshoremen's Act, 33 USCA 901-950. Section 905 of said Act, under the heading “Exclusiveness of Liability” provides in part as follows:

“The liability of an employer * * * shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and *anyone* otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *”.
(Emphasis added.)

We are of course aware of the several District Court decisions in which it has been held that notwithstanding the fact that an employer has secured compensation coverage under the Longshoremen's Act, he may still be impleaded by a third party who has been sued by an employee of said employer. We are in complete disagreement with those holdings and we feel that the only logical ruling should be as laid down by District Judge McCulloch of the District of Oregon in the case of *Leon E. Johnson v. U. S. A. et al.*, Civil No. 3884, decided June 19, 1948. Opinion in full is set forth as Part II in the attached Appendix.) Judge McCulloch ruled that “to hold that an employer under a compulsory (as to him) compensation act can be sued indirectly, as proposed here, is like opening a hole in a dyke, it destroys the basic purpose of compensation. As well say that the employer can be offered to the injured workman as a co-defendant under Rule 56. The difference is a matter of words only.”

Judge McCulloch, as he points out in his opinion, concurred with Judge Inch of the District Court of the Eastern District of New York in the case of *Fruesteri v. U. S. A. et al.*, 76 Fed. Supp. 667. In that

case, a stevedore was injured while working aboard a Government vessel. He filed a libel against the United States, which in turn impleaded the injured man's employer. The Court held:

“I find that Tickel (the employer) has duly provided compensation under the Longshoremen's Act for libelant and that this remedy is exclusive.” (Authorities cited.)

A careful reading of Section 905 of the Longshoremen's Act, *supra*, together with an appraisal of the background of the law, dispels any doubt that an employer's liability “is exclusive and in the place of all other liability of such employer”, not only as to his employees or dependents and legal representatives of such employees, but also, as expressly stated, “anyone otherwise entitled to recover damages at law or in admiralty on account of such injury or death.” A third party certainly comes within the definition of the term “anyone” as set forth in the quoted statute.

Insofar as we have been able to discover, the first and only time that the United States Circuit Court was called upon to pass on this precise question was in the case of *Porello v. U.S.A. et al.*, 153 Fed. (2d) 605, 607. The District Court in that case had rendered a decree in favor of an injured stevedore and against the United States, owner of the public vessel involved. The libelant's employer, who had been impleaded by the Government, was held liable for contribution of one-half. Both respondents appealed. The lower court and the Circuit Court were satisfied that the accident

was due both to the absence of a locking device on the hatch beam and to the negligent order of the injured man's foreman in causing a vehicle to be raised against the hatch beam in question, thereby upsetting it, with the result that the vehicle and some hatch boards fell and struck the libelant. The work was being done pursuant to a stevedoring contract which differed in its wording from the contract in the matter at bar. One of the pertinent provisions was in part as follows:

"The stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same * * * through the negligence or fault of the stevedores, his employees and servants."

In its original decision, the Circuit Court held (p. 607) as follows:

"In our opinion the absence of the lock and DiMare's negligent order operated concurrently in producing the result. Hence both the tortfeasors would be jointly and severally liable and each should bear one-half of the libelant's damages, *except for the statutory immunity granted by Section 5, 33 USCA, Section 905, which makes the compensation liability exclusive with respect to the employer.*

"For a right of contribution to accrue between tort-feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured. A.L.I. Restitution § 86; 13 Am. Jur., Contribution § 51. *Since the libelant has no cause of action against his employer, the United States can claim*

no contribution on the theory of a common liability which it has been compelled to pay. See Consolidated Coach Corp. v. Burge, 245 Ky. 631, 54 S.W. 2d 16, 85 A.L.R. 1086; Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721, 92 A.L.R. 680.” (Emphasis added.)

On Petition for Rehearing the Circuit Court held that the foregoing language was not necessary to the opinion since, under the terms of the contract, the stevedore company was obligated to fully indemnify the United States for the loss in question. In this respect the Court stated (p. 609):

“We are by no means convinced that the rule of *The Chattahoochee*, 173 US 540, 19 S. Ct. 491, 43 L. Ed. 801, which was not previously called to our attention, is controlling in a situation such as this, but the point may be considered left open since determination of the right of contribution is not essential to a decision as to indemnity under the respondent’s contract.”

In other words, it was held that the point raised may be considered left open, since it was unnecessary to the determination of the case, in view of the indemnifying provision of the contract. But the Court was careful to point out that it was “by no means convinced that the rule of *The Chattahoochee* is controlling in a situation such as this.”⁴

⁴On appeal the United States Supreme Court in *American Stevedores, Inc. v. Porello et al.*, 330 U.S. 445, 91 L. Ed. 1011, affirmed the decree of the Circuit Court as to Porello, but reversed the decree awarding full indemnity to the United States under the stevedoring contract, and remanded the case to the District Court for determination of the meaning of the contract.

Thus, it is clear that we still have as the only expressed opinion of the Circuit Court on the point in question, that the statutory immunity granted by Section 5 (33 U.S.C.A. Section 905) of the Longshoremen's and Harbor Workers' Act, "makes the compensation liability exclusive with respect to the employer" and that in the absence of an indemnifying contract, the employer can not be held liable-over to a third party.

To allow the continuance of the practice of impleading employers in actions of this kind will be to practically eliminate the express intention of the Longshoremen's Act, *supra*, and to make available to longshoremen and harbor workers the additional, and never-intended, right, in effect, to sue their employers.

CONCLUSION.

By reason of the foregoing, we respectfully submit that the records below in both cases fully support the decrees dismissing Appellee Arrow Stevedoring Company from all liability in the premises. The accident was solely and proximately caused by the unseaworthy condition of the vessel and the negligence of the Government employees in failing to correct the defective conditions after being given prompt notice thereof. The stevedoring contract in any event makes the Government solely liable and relieves Arrow of all liability. Furthermore, by reason of the fact that Arrow had secured compensation coverage under the Long-

shoremen and Harbor Workers' Compensation Act, which is its exclusive liability, the Government may not lawfully recover any part of the sums for which it was held liable under the decrees entered in the court below. Moreover, since the Government failed to take appeals from the decrees in favor of libelants, although it claims to have a valid and complete defense thereto, Arrow cannot be held liable-over for any part of the judgments. It is clear, also, that Arrow is entitled to a lien to the extent of its compensation and medical expenditures, as found and decreed by the trial court.

Dated, San Francisco, California,
December 15, 1948.

Respectfully submitted,

JOHN H. BLACK,

EDW. R. KAY,

*Attorneys for Appellee
Arrow Stevedoring Company.*

(Appendix Follows.)



Appendix.

Appendix

PART I.

PORTIONS OF STEVEDORING CONTRACT.

(Respondents' Exhibit B in Williams Case.)

Article 26. *Liability and Indemnity.*

(a) The Contractor shall procure and maintain at all times during the continuance of this agreement a policy or policies of insurance with underwriters to be approved by the contracting officer insuring the Contractor against liability for injury to or death of any person or persons to an amount not less than \$250,000.00 in any one accident, and for property damage occasioned to any pier, car, lighter, vessel, cargo or other property to an amount not less than \$250,000.00 in any one accident arising out of any operations performed hereunder.

(b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the negligence or wrongful acts or omissions of the Contractor's officers, agents or employees or through fault of its equipment or gear, subject, however, to the following limitations and conditions:

(1) The Contractor's liability to the Government shall be limited to the sum of \$250,000.00 for loss or damage in connection with any single catastrophe, accident or occurrence in the event that any such catastrophe, accident or occurrence and such loss or damage shall arise from or be in any way attributable to or

connected with the presence or proximity of ammunition, explosives, gasoline or other inherently dangerous cargoes or the loading, discharging or handling of such cargo by the Contractor.

(2) The Contractor shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government, or resulting from compliance by officers, agents, or employees of the Contractor with specific directions of the Port Director, NTS, Twelfth Naval District. Nor shall the Contractor be so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government.

(c) The services to be performed in pursuance of the provisions of this contract are incident to war activities of the Government and will include services of a nature normally performed by the Contractor in peace time commercial operations with the risks and hazards normally incident thereto and may involve the loading, discharging, handling, presence or proximity of ammunition, explosives, gasoline, and other inherently dangerous cargoes. It is understood that the consideration herein provided to be made to the Contractor for the services to be performed hereunder have been established with regard only to the normal risks and hazards involved in similar services in peace time commercial operations, but that such consideration does not include any allowance for the additional and extraordinary risks and hazards described above. To induce the Contractor to undertake the performance of such services for the consideration

herein provided, and thus obtain for the Government the resulting benefit of such reduced consideration, the Government will hold the Contractor harmless against any loss, expense (including expense of litigation), and liability to third persons because of death, bodily injury, or property damage or destruction or otherwise of any kind whatsoever, irrespective of negligence of Contractor, his officers, agents, servants or employees; subject, however, to the following conditions and limitations:

(1) The undertaking of the Government shall be applicable and limited to situations where such loss, expense or damage arises out of, results from or is in any way attributable to or connected with the presence or proximity of ammunition, explosives, gasoline, or other inherently dangerous cargoes, or the loading, discharging or handling of such cargo by the Contractor.

(2) The undertaking of the Government shall be applicable and limited to situations where the total and entire amount of such loss, expense, or damage pertaining to any single catastrophe, accident, or occurrence, exceeds the sum of \$250,000.00 and further, shall be limited to the excess over and above \$250,000.00 of the total and entire amount of such loss, expense and damage, pertaining to any single catastrophe, accident or occurrence.

(3) The undertaking of the Government shall not be applicable, and the Government shall have no obligations or liability in respect of such undertaking or otherwise, in situations where such loss, expense, or

damage is due to willful and deliberate disregard of instructions of the Port Director, NTS, Twelfth Naval District, or to the personal failure to exercise good faith or that degree of care normally exercised in the performance of Contractor's peace time commercial operations by the elected corporate officers of the Contractor or the representative of the Contractor having supervision and direction of all operations at any pier where the Contractor may perform services hereunder.

(4) Notwithstanding any other provision of this contract, the Contractor agrees to waive any right of reimbursement for loss or damage of any kind or character which it may have against the Government under any provision of this agreement if said loss or damage is covered by insurance and Contractor has collected or may collect for said loss or damage from the insurance company. The Contractor further agrees to have attached to and made a part of all insurance policies issued pursuant to this agreement on operations thereunder a rider by the terms of which the insurance company agrees to waive any and all rights of subrogation which it may have against the United States by reason of any payment under said policy.

PART II.

In the District Court of the United States
for the District of Oregon

Civil No. 3884

Leo E. Johnson,

Libelant,

vs.

The United States of America, The
War Shipping Administration, and
The United States Maritime Com-
mission, and Kaiser Company, Inc.
(a corporation), Impleaded,

Respondents.

MEMORANDUM OPINION

This case raises the question whether a ship sued for an accident to a harbor worker can implead and claim contribution from the harbor worker's employer, in disregard of the provisions of the Longshoremen's and Harbor Workers' Compensation Act that the liability for compensation "shall be exclusive".

I have deferred decision of the question until I could have the benefit of the argument of the senior member of the admiralty bar, Mr. Erskine Wood, in another case. Mr. Wood feels that an employer can

be impleaded, and cites *American Stevedores v. Porello*, 330 U.S. 446, 458, and a number of District Court decisions.

First, let me say I do not think the Supreme Court's language in the *Porello* case justifies the claim that is made for it. The Court was primarily concerned with other questions.

Judge Inch, alone of the eastern admiralty judges, has held, and I confess by dictum only, that the injured harbor worker's employer cannot be sued. *Frusteri v. United States*, 76 F. Supp. 667. I am going along with Judge Inch. We are supported strongly, I feel, by the consideration given to the question by the Second Circuit Court of Appeals in the *Porello* case, on its way up. 153 F. 2nd 605.

In my time, compensation supplanted litigation in the industrial field. The State of Washington was the first, and Oregon was one of the earliest States, to pass compensation laws. This was because of the paramount influence of the logging and lumbering industry in both States. The cruel injustice to workmen in this industry, where the percentage of casualty was high, of leaving injured workmen to the harsh and inadequate remedies provided by the common law, brought about the passage of compensation acts. The movement swept the country.

To hold that an employer under a *compulsory* (as to him) compensation act can be sued indirectly, as proposed here, is like opening a hole in a dike. It destroys the basic principle of compensation. As well

say the employer can be offered to the injured workman as a co-defendant, under Rule 56. The difference is a matter of words only.

Dated, June 19, 1948.

Claude McColloch,
Judge.

Case No. 77-07
No. 11527

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,
Appellant,

vs.

FRANK D. HALL and MARGUERITE S. HALL,
Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

1947

PAUL P. O'BRIEN,

CLERK



No. 11527

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,
Appellant,

vs.

FRANK D. HALL and MARGUERITE S. HALL,
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TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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For Appellees:

C. P. VON HERZEN

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Los Angeles 13, Calif.

and

EDGAR F. HUGHES and

DAVID A. SONDEL

1007 Van Nuys Building

Los Angeles 14, Calif. [1*]

In the District Court of the United States for the
Southern District of California, Central Division

No. 41731-PH

In the Matter of

FRANK D. HALL and MARGUERITE S. HALL,
Husband and Wife,

Debtors.

DEBTOR'S PETITION IN PROCEEDINGS UNDER
SECTION 75 OF THE BANKRUPTCY ACT

To the Honorable Paul J. McCormick, Senior Judge of
the District Court of the United States for the
Southern District of California:

The Petition of Frank D. Hall and Marguerite S. Hall,
residing at Leona Valley, via Palmdale, California, County
of Los Angeles, State of California, respectfully rep-
resents:

That he is primarily bona fide personally engaged in
producing products of the soil (or that he is primarily
bona fide personally engaged in dairy farming, the pro-
duction of poultry or livestock, or the production of poul-
try products or livestock products in their unmanufac-
tured state, or the principal part of whose income is
derived from any one or more of the foregoing opera-
tions) as follows: Farming and cattle ranching in Leona
Valley, near Palmdale. That Frank D. Hall and Mar-
guerite S. Hall are husband and wife respectively, and
the property described herein is owned by both of said

petitioners; that such operations occur in the county of Los Angeles, within said judicial district; that he is insolvent (or unable to meet his debts as they mature); and that he desires to effect a composition or extension of time to pay his debts under section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A," and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

That the schedule hereto annexed, marked "B," and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

FRANK D. HALL
MARGUERITE S. HALL
Petitioners

C. P. VON HERZEN
Attorney for Petitioners

[Verified.]

[Endorsed]: Filed Dec. 9, 1942. [2]

[Title of District Court and Cause]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE

(Under Section 75 Bankruptcy Act)

At Los Angeles, in said District, on December 9, 1942, before the said Court the petition of Frank D. Hall and Marguerite S. Hall, husband and wife, that he desires to effect a composition or an extension of time to pay his debts, and such other relief as may be allowed under the Act of March 3, 1933, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to H. Sidney Laughlin, Esq., one of the Conciliation Commissioners in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Frank D. Hall and Marguerite S. Hall, husband and wife, shall attend before said Conciliation Commissioner on December 16th, 1942, and at such time said Conciliation Commissioner shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said Conciliation Commissioner or by this Court relating to said matter.

Witness, the Honorable Ben Harrison, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on December 9, 1942.

(Seal)

EDMUND L. SMITH

Clerk

By E. M. Enstrom, Jr.

Deputy Clerk

[Endorsed]: Filed Dec. 9, 1942. [3]

[Title of District Court and Cause]

PETITION FOR ADJUDICATION
(Under Sub-section S of Section 75 of the
Bankruptcy Act)

Come now the debtors, Frank D. Hall and Marguerite S. Hall, and respectfully petition to be adjudicated bankrupts under the provisions of Sub-section S of Section 75 of the Bankruptcy Act, and represent as follows:

That your petitioners filed a petition in the above entitled Court for extension of time within which to effect a composition or extension to pay their debts under the provisions of Section 75 of the Bankruptcy Act, which said petition was filed on or about December 10, 1942, and that thereafter, and on or about the 14th day of January, 1943, a Motion to Dismiss the proceedings on the ground that the debtors were not farmers and on the further ground that they were not the owners of the real property set forth and described in the schedules attached to their petition was filed by the creditor, Pacific States Corporation; that said Motion was heard at length by the Honorable H. Sidney [4] Laughlin, Conciliation Commissioner of Los Angeles County, commencing January 20, 1943 and continuing thereafter on various dates until on or about May 18, 1943, at which time the Conciliation Commissioner determined said Motion adversely to the movant, Pacific States Corporation.

That the debtors have proposed a Composition and Extension Agreement to their creditors and that such proposal has been rejected, and it appears that no other proposal which the debtors are in a position to make will be accepted; that at all times the debtors have held themselves amenable to the orders of the Conciliation Com-

missioner of Los Angeles County, and that they have not, nor has either of them, done, suffered or permitted any act contrary to the Bankruptcy statutes of the United States.

Pursuant to the provisions of Section 75 of the Bankruptcy Act, the debtors now request that they be adjudicated bankrupts under the provisions of Sub-section S of Section 75 of the Bankruptcy Act, and that all of their property be appraised and that their exemptions be set aside to them, and that they be allowed to retain possession of all of their property under the terms and conditions set forth in said Sub-section S of Section 75 of the Bankruptcy Act.

FRANK D. HALL

MARGUERITE S. HALL

Petitioners

C. P. VON HERZEN

Attorney for Petitioners

The foregoing Petition of the Debtors, Frank D. Hall and Marguerite S. Hall, is approved in all respects and the undersigned certifies that the facts therein set forth are true, and that the debtors have done nothing contrary to the Bankruptcy Act and are entitled to be adjudicated Bankrupts under Sub-section S, Section 75 of the Bankruptcy Act.

H. SIDNEY LAUGHLIN

Conciliation Commissioner of Los Angeles County,
California [5]

[Verified.]

[Endorsed]: Filed Jun. 4, 1943. [6]

United States District Court
Southern District of CaliforniaORDERS OF ADJUDICATION AND OF GENERAL
REFERENCE UNDER SECTION 75(s)

At Los Angeles, in said District, on June 4, 1943.

The Court having duly considered the following Petitions of Debtors to be adjudged bankrupts under the terms and provisions of subsection (s) of Section 75 of the Bankruptcy Act; it is hereby adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy and each of said proceedings is referred generally to the Conciliation Commissioners whose names appear opposite thereto:

Number	Title of Proceedings	Conciliation Commissioner
41,731-PH	Frank D. Hall and Marguerite S. Hall husband and wife	H. Sidney Laughlin, Esq.

And it is further ordered, adjudged and decreed that all creditors of the above-named bankrupts be and they are hereby enjoined and restrained from commencing or maintaining any judicial or official proceedings in any Court, or under the direction of any official, against the said bankrupts, or any of their property, and from proceeding with any sale of the bankrupts' property under the terms of any Deed of Trust, until further order of this Court.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Jun. 4, 1943. [7]

[Title of District Court and Cause]

PETITION FOR DETERMINATION OF AMOUNT
OF EXISTING LIEN AND ENCUMBRANCE

Come now the debtors, Frank D. Hall and Marguerite S. Hall, and respectively file this petition for determination of the sum due upon an encumbrance against the real property of said debtors, and represent as follows:

I.

That your petitioners are the owners of all that certain real property described in the Schedules attached to the Petition of the debtors on file herein, and shown on Schedule B. page 7 as "Ranch at Leona Valley, near Palmdale", the legal description of which is attached to said Schedule in a photostatic copy thereof.

II.

That on the 30th day of July, 1927, a deed of trust was executed, in which the Pan American Bank of California was beneficiary, and the Title Insurance & Trust Company was trustee, [18] covering the above described real property, and securing a note in the sum of \$45,000.00, payable on or before five years from the above date.

That concurrently, a separate declaration of trust, commonly referred to as a subdivision trust, was executed in respect to the same real property, wherein the Pan American Bank of California was the beneficiary and trustee; and that subsequently, by reason of the liquidation of the Pan American Bank of California, said bank was unable to perform its duties as trustee, and a substituted declaration of trust was executed, wherein the Citizens National Trust & Savings Bank became trustee.

III.

That as of December 31, 1941, the principal sum of said note had been reduced to \$23,921.22, and that at said time, the trustee Citizens National Trust & Savings Bank had in its possession additional sums of cash to further apply in the reduction of the unpaid principal sum of said note; and that prior to said date, interest had been paid on said note in a sum of not less than \$13,669.68.

IV.

Pacific States Corporation claims and professes to presently own said note and beneficial interest in said deed of trust and declaration of trust; that said claim of ownership is based upon an assignment received by it from the Superintendent of Banks under the following circumstances:

(a) Pacific States Corporation had filed its claim for damages for anticipated breach of the lease of the premises theretofore occupied by said bank in premises known as the Merritt Building, owned by said Pacific States Corporation;

(b) The claim had been rejected by the Superintendent of Banks; [19]

(c) Pacific States Corporation filed its suit in the Superior Court of Los Angeles County upon such rejected claim;

(d) Judgment was entered in favor of the Superintendent of Banks, and against the Claimant, Pacific States Corporation, on said cause of action;

(e) The Claimant appealed from such judgment; and the appeal was pending in November, 1939, and at the time that

1. The Superintendent of Banks had succeeded in paying the depositors of Pan American Bank 100% of their respective deposit claims;

2. The Superintendent was anxious to and desirous of closing the liquidation proceedings of Pan American Bank;

3. The Superintendent had on hand and undisposed of, miscellaneous assets of the Pan American Bank, consisting principally of \$15,000.00 in cash, miscellaneous articles of personal property, such as furniture and fixtures, miscellaneous intangibles, including notes, stocks and judgments, and various interest in real estate, all of which assets of every kind and nature (exclusive of the cash of \$15,000.00), were appraised and valued at \$27,500.00, including the aforesaid unpaid note, secured by said deed of trust and declaration of trust;

4. The Superintendent was unable to close the liquidation proceedings because of the pendency of the appeal of Pacific States Corporation, and the fact that he had not disposed of the remaining assets as above described.

(f) That by an order of the Superior Court all of the assets set forth in Paragraph IV, Subdivision e, (3), were assigned and transferred to Pacific States Corporation in exchange for a dismissal of its appeal aforesaid.

V.

That petitioners allege upon information and belief, that in proportion to all of such transferred assets having a [20] value of \$27,500.00, the maximum value of said note, deed of trust and declaration of trust did not exceed \$15,000.00.

VI.

Debtors further allege that the Pacific States Corporation, as the purported present holder of said lien and encumbrance, has not filed a claim in these proceedings and is withholding the filing of such claim; that sales of certain portions of the debtors' real property have been arranged by the debtors, to certain third persons, in the aggregate sum of approximately \$50,000.00.

VII.

Your petitioners allege that the debt secured by the afore-mentioned deed of trust and declaration of trust has outlawed many years prior hereto, and that in equity and good conscience the holder of said encumbrance, Pacific States Corporation, should be required to accept in full payment and discharge of said obligation, a sum no greater than the value of its claim against the Superintendent of Banks, hereinbefore described, which did not need the appraised value of the assets accepted by said creditors less the proceeds received from the other assets transferred to it, but that the debtors in any event are entitled to a judgment and decree of this Court determining the sums that are due to said alleged creditor,

Pacific States Corporation, and to have said sum fixed and determined concurrently with or prior to the closing of its escrows by which the sum of approximately \$50,000.00 will become available for the mutual benefit of the debtors and their creditors.

Wherefore, petitioners pray that this petition may be set for hearing upon notice or order to show cause, addressed to Pacific States Corporation, the alleged holder of said encumbrance against the debtors' real property, all as the Commissioner herein may deem proper, and that upon said hearing, the amount due or payable upon said encumbrance be fixed and determined, [21] and that upon payment of such sum as may be so fixed and determined, the said creditor be required to give a full and complete release, reconveyance and acquittance to these debtors, and for such other and further relief as the facts presented to the Commissioner and the law applicable thereto may warrant.

FRANK D. HALL

MARGUERITE S. HALL

C. P. VON HERZEN

Attorney for Petitioners [22]

[Verified.]

[Endorsed]: Filed Jul. 19, 1943. Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. [23]

[Title of District Court and Cause]

ANSWER OF PACIFIC STATES CORPORATION
TO PETITION FOR DETERMINATION OF
AMOUNT OF EXISTING LIEN AND EN-
CUMBRANCE.

Comes now Pacific States Corporation, designated as "creditor," and without waiving its right to object to the jurisdiction of this Court over these proceedings, but reserving said right, answers the petition of debtors for determination of the amount of existing lien and encumbrances as follows, to wit:

I.

Denies that the petitioners are the owners of the real property referred to in Paragraph I of said petition, or any part of said real property or of any interest therein, legal or equitable, and in this connection alleges that Citizens National Trust & Savings Bank of Los Angeles is the owner of all of said real property and owns the entire legal and equitable interest therein by virtue of the subdivision trust referred to in Paragraph II of said petition; and alleges that petitioners are entitled to and have only an interest in the proceeds of the sale or sales of said real property under the terms of said [24] subdivision trust.

II.

Alleges that the principal sum now remaining unpaid upon the promissory note referred to in Paragraphs I and III of said petition is the sum of \$23,921.52; and further alleges that interest has been paid on said promissory note to January 30, 1932, and that the sum of only \$363.85 has been paid since on said interest, which sum was paid on the 23d day of August, 1937, and that on

October 30, 1943, there will be due, owing, and unpaid thereon interest in the sum of \$35,210.87.

III.

Answering Paragraph IV of said petition, said Pacific States Corporation alleges that it is the owner of a beneficial interest in said promissory note and in said deed of trust and in the said Declaration of Trust referred to in Paragraphs II and IV of said petition. Further answering said Paragraph IV, and in particular subparagraph (e) 3 thereof, said Pacific States Corporation denies that the undisposed assets of Pan American Bank were appraised or valued at \$27,500.00 or any other sum, but in that connection that the Superintendent of Banks in his petition for authority to compromise had estimated them to be of a value of \$27,500.00. That said assets were then actually of a much greater value and that Pacific States Corporation at all times estimated them to be of a value greatly exceeding \$27,500.00. That Pacific States Corporation estimated the value of its claim to be the sum of \$1,094,000, but inasmuch as the assets referred to were all of the remaining assets and its recovery would be limited to the remaining assets of said Pan American Bank, said Pacific States Corporation agreed to a compromise of its said claim in exchange for a transfer of said assets, in order that it might endeavor to recover as much as possible in the collection of said assets. That a large portion [25] of its aforesaid claim of \$1,094,000 represented rental of certain real property for a period of time theretofore expired, and that the balance only of said claim was for damages covering a future period of time.

IV.

Denies the allegations of Paragraph V of said petition.

V.

Denies that the debt secured by the deed of trust and declaration of trust referred to in said petition has "outlawed," as alleged in Paragraph III of said petition, or that it was barred by any limitation of time or otherwise; and denies that Pacific States Corporation or that the legal holder of said lien or encumbrance in equity and/or in good conscience should be required to accept in full payment or discharge of said obligation a sum less than the balance of principal and interest due thereon in accordance with the terms of said note, said deed of trust, and said declaration of trust.

VI.

That the Court has no jurisdiction of the petitioner and of this proceeding because the petitioners, debtors, are not the owners of the real property referred to in said petition nor of any legal or equitable interest therein, and have not now and never had any right to redeem from said lien and encumbrance; and that said petition and said proceeding should be dismissed for lack of jurisdiction.

Wherefore, the said Pacific States Corporation prays that the Court dismiss said petition, and, if it be not dismissed, that the Court determine the amount of said lien and encumbrance to be the principal sum of \$23,921.22 plus interest unpaid on said promissory note, computed in accordance with the terms of said note.

RICHARD L. NORTH

Attorney for Pacific States Corporation [26]

[Verified.]

[Endorsed]: Filed Oct. 2, 1943. Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. [27]

[Title of District Court and Cause]

PETITION FOR ORDER TO APPLY MONEYS TO PAYMENT OF DEBT

Come now Pacific States Corporation, as Beneficiary, and Citizens National Trust and Savings Bank, as Trustee under its Trust No. 5873, and respectfully represent:

I.

That all of the real property listed in the Schedule of Assets by the debtors herein, is covered by and is the body of Trust No. 5873 in the Citizens National Trust and Savings Bank of Los Angeles, located at 457 S. Spring St., in the City of Los Angeles, State of California, which trust was created and entered into December 2, 1929.

II.

That five separate sales of portions of said property have been negotiated by the debtors and are now in escrow in said bank, and that the escrow numbers, purchase prices, the names of the purchasers and the property covered by and proposed to be sold [28] through each of said escrows are, respectively, as follows:

<u>Escrow No.</u>	<u>Purchase Price</u>	<u>Purchaser</u>	<u>Description of Property</u>
63258	\$28,150.00	Arnold Munz and Martha Munz Hus- band and Wife	All unsold portions of Sect. 12, Township 6 N. Range 14 W. S.B. M. lying South of the highway, comprising approx. 312 acres, to- gether with Lots 65 & 66 of Tr. 5148 as per Map recorded in Book 56, Page 78, Records

<u>Escrow No.</u>	<u>Purchase Price</u>	<u>Purchaser</u>	<u>Description of Property</u>
			of Los Angeles County. Lots 29 and 31 of Tr. 5148
			Lots 36, 44, 47, 48, 49, 50, 67, 68, 69, 70, 71, 72 and 73 of Tract 5148
63257	12,675.00	William S. Swartz and Marjorie A. Swartz Husband & Wife	Sec. 1 and all of Sec. 12 North of center line of the Elizabeth Lake Road, all in Township 6 N. Range 14 W. S.B.M. Los Angeles County.
63256	4,500.00	Ritter Bros.	West half of the Northeast quarter of Sec. 11 Township 6 N. Range 14 W. S.B. M. Los Angeles County.
63255	2,200.00	Emil Herman and Louen Georgia Ritter	Lots 10 and 11 of Tract 5148
63254	6,000.00	Ritter Bros.	East half of the Northeast quarter of Sec. 11 Township 6 N. Range 14 W. S. B.M. Los Angeles County
Of which \$3500, more or less being balance due on Agreement of Sale plus int. and taxes will be re- ceived by Trust 5873. HSL			

Ritter Bros. are a co-partnership consisting of Charles F., Adolf E., Albert G., Emil H., and John G. Ritter.

III.

That the debt owing to petitioners amounts to the sum of approximately \$70,000.00, of which \$50,000.00 is admitted by the debtors; that the sum of \$6,515.92 has been advanced by said Trustee pursuant to the written request of the debtors and petitioners and that it is proper and equitable that all moneys up to the sum of [29] \$56,515.92 derived through any and all of said escrows shall be paid to said Citizens National Trust and Savings Bank, as Trustee, under its said Trust No. 5873, to be disbursed by said trustee in accordance with the terms and provisions of the said Trust.

Wherefore petitioners pray that an order be made by the Conciliation Commissioner requiring that, when available, all moneys derived from said proposed sales up to the sum of \$56,515.92 be immediately paid to petitioner Citizens National Trust and Savings Bank, as Trustee, under its Trust No. 5873, with authority in said bank to disburse the same in accordance with the terms and provisions of the said Trust.

Dated, July 20, 1943.

PACIFIC STATES CORPORATION

By A. Q. Robison

Secretary

CITIZENS NATIONAL TRUST AND
SAVINGS BANK, Trustee

By Frank A. Ford

Ass't Trust Officer [30]

[Verified.] [31]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 26, 1943. Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. [32]

[Title of District Court and Cause]

ANSWER TO "PETITION FOR ORDER TO AP-
PLY MONEYS TO PAYMENT OF DEBT"

Now comes the debtors, and answering the petition of Pacific States Corporation and Citizens National Trust and Savings Bank, as Trustee, for an order to apply moneys to payment of debt, admit, deny and allege as follows:

Answering paragraph III of the petition, specifically deny that the debt owing to the said petitioners or either of them amounts to the sum of approximately \$70,000.00; allege that at no time subsequent to July 1, 1940, did the principal sum of the indebtedness exceed \$23,921.52; allege that the sum of \$23,921.52 is the maximum amount of the indebtedness of any principal sum due or owing to said petitioners; deny that debtors have at any time admitted an indebtedness of \$50,000.00; admit they authorized the Trustee to expend necessary funds for payment of taxes, but allege they do not know whether the amount so expended was or is \$6,515.92.

Wherefore, these answering debtors pray that the petition [33] be in all respect denied and dismissed.

C. P. VON HERZEN

GOUDGE, ROBINSON & HUGHES

By Edgar F. Hughes

DAVID A. SONDEL

Attorneys for Debtors [34]

[Verified.]

Received copy of the within, Richard L. North, this 12 day of August, 1943, Attorney for Claimant.

[Endorsed]: Filed Aug. 12, 1943.

[Endorsed]: Filed Jun. 7, 1946. [35]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW UPON "PETITION FOR DETERMINA-
TION OF AMOUNT OF EXISTING LIEN AND
ENCUMBRANCE," AND UPON "PETITION
FOR ORDER TO APPLY MONEYS TO PAY-
MENT OF DEBT"

The debtors Hall filed herein on July 19, 1943 their "Petition for Determination of Amount of Existing Lien and Encumbrance".

After due notice, hearing thereon was held before the Conciliation Commissioner-Referee on August 12th and 13th, October 4th, 5th, 14th, 22nd and 27th, 1943.

The debtors Hall appeared in person and by their counsel, C. P. Von Herzen, Esq., Edgar F. Hughes, Esq., and David A. Sondel, Esq.

The Pacific States Corporation appeared by its counsel, Richard L. North, Esq., and Elbert W. Davis, Esq.

The Pacific States Corporation, during the pendency of the hearing, to wit, on October 2, 1943, filed a written answer to the petition, supra, reserving the right to object to the jurisdiction of the Court over these proceedings to determine the amount of existing lien and encumbrance. On October 4, 1943, during the proceedings, Pacific States Corporation orally moved to dismiss the petition, and [36] objected to the jurisdiction of the Court. The motion to dismiss was denied and the objection overruled.

On July 20, 1943, Citizens National Trust and Savings Bank of Los Angeles, joined by Pacific States Corpora-

tion, and with the approval of the latter, filed a claim herein the total sum of \$70,769.69, at the request of Richard L. North, Esq., acting as attorney for said Bank and Corporation. The said claim was withdrawn on October 5, 1943, to which C. P. Von Herzen, Esq., on behalf of the debtors, objected, which objection was overruled.

On July 20, 1943, Pacific States Corporation, as beneficiary, and Citizens National Trust and Savings Bank of Los Angeles, as Trustee under Trust No. 5873, through Richard L. North, Esq., acting as their attorney, filed a "Petition for Order to Apply Moneys to Payment of Debt," to which petition an answer was filed by the debtors through C. P. Von Herzen, Esq., Goudge, Robinson & Hughes, by Edgar F. Hughes, Esq., and David A. Sondel, Esq., as their attorneys. The petition last mentioned has not been withdrawn, and the debt referred to therein is the debt which is secured by the lien and encumbrance, the amount of which the debtors Hall are seeking to have determined in these proceedings.

Evidence, both oral and documentary, was introduced, and in addition to opening statements of counsel, the cause was argued at length after the conclusion of the testimony and the matter then submitted for the Court's decision, and the Court having duly considered the evidence and the arguments and having thereupon made and filed herein a minute order of its decision, and having therein directed that findings and an order be prepared by the counsel for the debtors, and the same having been so prepared, the Court now makes the following findings:

I.

The debtors are the owners, subject to the lien of the deed of trust (of which Title Insurance and Trust Company is the [37] Trustee), hereinafter referred to, and to the lien of the Declaration of Trust, No. 5873, (of which Citizens National Trust and Savings Bank of Los Angeles is Trustee), also hereinafter referred to, of all that certain real property described in the schedules attached to the original petition for adjudication filed by the debtors herein, and shown on Schedule B, page 7, as "Ranch at Leona Valley, near Palmdale," the legal description being attached to said schedule in a photostatic copy.

II.

On July 30, 1927, Farm Home Builders Incorporation, a corporation, made, executed and delivered to Pan-American Bank of California, a promissory note in the principal sum of \$45,000.00, dated at Los Angeles, California, July 30, 1927, payable on or before five years after its date and bearing interest at the rate of 7% per annum, payable quarterly in advance, the payment of said promissory note being guaranteed by the debtors individually, and said promissory note reading as follows:

"\$45,000.00 Los Angeles, California, July 30th, 1927

On or before Five (5) Years after date, for value received, I, we, or either of us promise to pay to Pan American Bank of California, a corporation, or order, at Pan American Bank of California, Los Angeles, Calif., the sum of Forty Five Thousand and No/100 (\$45,000.00) Dollars, with interest from date until paid, at the rate of seven (7%) per cent per annum, payable quarterly, in advance.

Should interest not be so paid, it shall become part of the principal and thereafter bear like interest. Should default be made in payment of interest when due, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due. Principal and interest payable in United States gold coin. This note is secured by a Deed of Trust to Title Insurance [38] and Trust Company, a corporation, of Los Angeles, California.

226 So. Lafayette Park
Place FI 3701

FARM HOME BUILDERS, INCORPORATED

By F. D. Hall, President

By Erwin S. Hall, Secretary”

On the same date, viz., July 30, 1927, the said Farm Home Builders Incorporated, as Trustor, for the purpose of securing the payment of said promissory note, made, executed and delivered a deed of trust in which Title Insurance and Trust Company is named as Trustee, and Pan-American Bank of California is named as beneficiary, and which covered the said “Ranch at Leona Valley near Palmdale” before portions of its were sold and released from the lien of the said deed of trust, as hereinafter mentioned. Said deed of trust was recorded August 20, 1927, in Book 7684, page 131 of Official Records of Los Angeles County.

Concurrently with the giving of the said deed of trust, a declaration of trust, for the purpose of enabling the debtors to pay their indebtedness, was entered into, which covered the said ranch property, and which provided for the management of said ranch property and for the sale

and release of portions of the land and for the application of the proceeds of sale to the payment of selling commissions, taxes, trustee's fees and expenses, and to the payment and satisfaction of the said promissory note, and in which declaration of trust the said Pan-American Bank of California was named to act as Trustee. On December 2, 1929, the Superintendent of Banks of the State of California, having in the meantime closed the said Pan-American Bank of California, and taken charge of its assets and affairs for the purposes of liquidation, as provided in the Bank Act of California, and the said bank being thereby disqualified from continuing to act as trustee, a substituted declaration of trust was entered into by the concurrence of all of the parties to the prior declaration of trust, and with the written consent and approval of the Special Deputy Super- [39] intendent of Banks of the State of California in charge of liquidation of said Pan-American Bank of California, and with the intent and purpose of carrying out the plan of the original declaration of trust in furnishing a means whereby the unpaid balance of the \$45,000.00 promissory note could be satisfied and paid through the sale of portions of the ranch property, and whereby the selling commissions provided in the declaration of trust could be paid from the proceeds of sale, as well as expenses, trustee's fees and taxes, and whereby upon the full payment of the said promissory note and other obligations of the trustor under the deed of trust and said declaration of trust No. 5873 or upon the termination of the declaration of trust the trustee was empowered to convey the trust estate to the parties in interest under the substituted declaration of trust. Said substituted declaration

of trust is numbered 5873, of Citizens National Trust and Savings Bank of Los Angeles, is dated December 2, 1929, and is made between said Citizens National Trust and Savings Bank of Los Angeles designated as "Trustee"; Farm Home Builders Incorporated, a corporation, designated as "Trustor", and/or "Beneficiary"; Pan-American Bank of California, designated as "First Payee", and Phillips & Hambaugh Realty & Construction Company, a corporation, designated as "Second Payee".

III.

The corporation known as Farm Home Builders Incorporated, was created and organized by the debtors herein, and Frank D. Hall, one of the debtors, was at all times its President and General Manager, and Marguerite S. Hall, his wife, the other debtor herein, its Vice-President. The said corporation was wholly owned and controlled by the debtors. The debtors conveyed to the said corporation the title to the ranch property prior to the execution of the said note, deed of trust and original declaration of trust, and the debtors, as already stated, individually guaranteed the payment of the said promissory note. The debtors received no cash, shares of stock or [40] other consideration from the said corporation for the conveyance of the title of the ranch property to the said corporation. On December 12, 1932, the said corporation by an instrument in writing transferred and assigned to the debtors all its interest as trustor and beneficiary in said declaration of trust No. 5873, which assignment was approved in writing by the Special Deputy Superintendent of Banks of the State of California, in charge of the liquidation of said Pan American Bank of California.

The debtor, Frank D. Hall, has, at all times since the execution of the said note and deed of trust, acted, and is now acting, as the Manager of the ranch property as owner thereof, and this Court has heretofore determined that the said Farm Home Builders, Incorporated, is the alter ego of Frank D. Hall and Marguerite S. Hall. The debtors maintained their family homestead at all of said times until the year 1941, on said ranch property, and the debtors have, at all of said times, been in possession of, and are now in possession of, the said ranch property not sold or conveyed.

IV.

At all times between the execution of the said promissory note and November 2, 1939, the said note was owned by Pan-American Bank of California. At all times between the date when the Superintendent of Banks of the State of California took charge of the assets of said bank in order to liquidate the same, and November 2, 1939, the said note and the debt is represented, and the security for same, were subject to the control and jurisdiction of the Special Deputy Superintendent of Banks of the State of California, in charge of liquidation of said Pan-American Bank of California, in accordance with the provisions of the said Bank Act of the State of California.

On November 2, 1939, the Special Deputy Superintendent of Banks of the State of California in charge of the liquidation of said Pan-American Bank of California, transferred and assigned in writing to Pacific States Corporation, the said note and the "First [41] Payees" interest in the said declaration of trust No. 5873, and the said Pacific States Corporation thereupon became, and

ever since has been, and is now, the owner of said note and of said "First Payees" interest in and under the said declaration of trust.

V.

Citizens National Trust and Savings Bank of Los Angeles has acted in its capacity of trustee under the terms of its said declaration of trust No. 5873 since the trust's inception in December, 1929, and up to the present time. It has from time to time entered into contracts of sale as parcels were sold, has collected the installments of the purchase prices as paid, and has executed conveyances as the purchase prices were paid in full; it has applied collections in payments of agents' and beneficiaries' commissions and operating expenses and in payment of principal, and up to January 30, 1932, of interest, on the promissory note obligation, and in the payment of trustee's fees, title and other charges, and has in general performed its duties under the said trust since it accepted the responsibility of trustee.

During the years 1933 and 1934 it prepared and rendered semi-annual accounts, and in the years 1935, 1936, 1937, 1938, 1939 and 1940, annual accounts of its collections, disbursements and distributions for the respective periods covered by the accounts, each of said accounts set forth a statement of the unpaid balance of the promissory note obligation at the beginning and ending of the accounting period. For the years 1933, 1934, 1935, 1936, 1937 and 1938, the said accounts were furnished to and received by the owner and holder of said promissory note, the Special Deputy Superintendent of Banks of the State of California in charge of liquidation of said Pan-American Bank of California and were at the same time

furnished to and received by the debtor, Frank D. Hall. Said accounts were accepted and acted upon by the said debtor and by the said liquidator as true and correct statements of account, both with respect to [42] mathematical accuracy and with respect to the proper method and mode of computing all sums due thereunder. For the years 1939 and 1940, the said accounts were furnished to and received by Pacific States Corporation and by the debtor, Frank D. Hall, and were accepted by them as true and correct statements of account.

None of the said accounts, except the one for 1940, showed the application of any sum to the payment of interest on the said obligation. The acceptance of said accounts constituted an intention on the part of the liquidator of said Pan-American Bank of California to waive interest, and said interest was actually waived by the owner and holder of said promissory note acting in conjunction with the obligors thereunder. The Citizens National Trust and Savings Bank of Los Angeles, as trustee of Trust No. 5873, and the said liquidator of Pan-American Bank of California, would, at all times during which said liquidator was the owner and holder of said promissory note, have accepted payment of the balance shown in the current account in full satisfaction of the said note, and which facts were known to the Pacific States Corporation at the time of the transfer of the note from the said liquidator to said creditor.

All interest which fell due on the said note was paid until January 30, 1932, the interest for the quarter ending on said date being paid on March 29, 1932. After the last mentioned date, no payments were applied by the

trustee to interest, except as shown in the 1940 account, where an application is made by the trustee of one-half of \$727.70 to principal, and the other one-half to interest, said sum of \$727.70 having been paid by the debtor, Frank D. Hall, to the said liquidator of Pan-American Bank of California, on August 23, 1927, and not having been previously shown on any accounts of the trustee.

The said note by its terms fell due on July 30, 1932, and the same was not renewed, extended or revived.

The statutory period for the commencement of an action at law [43] to collect the said promissory note expired July 30, 1936, and at the time the said application was made in the year 1940, of \$363.85. towards the payment of interest, the said note was long past due and the obligation outlawed.

At no time prior to 1942 was any statement prepared or furnished where interest was added to principal to establish a new principal for the calculation of subsequent future interest. In the year 1942, the Citizens National Trust and Savings Bank of Los Angeles, as trustee, at the instigation and by the direction of Pacific States Corporation, prepared a statement in which an attempt was made to re-compute the unpaid obligation represented by the said promissory note and wherein estimated interest was added to principal each quarter from the date of the note to indicate a new principal for the computation of the next quarter's interest, and thereby in effect to compound interest from the date of the note until the date of the statement. The debtors upon receipt of the said recomputation promptly rejected it and challenged the right of the trustee and of Pacific States Corporation to re-compute the obligation.

VI.

In accordance with the accounts prepared and furnished by the Citizens National Trust and Savings Bank of Los Angeles as Trustee under Trust No. 5873, and accepted as correct by the parties in interest at all times prior to the time that Pacific States Corporation acquired the said obligation, and also accepted by the latter corporation as to the accounts, as prepared and furnished in 1939 and 1940, the unpaid balances of the obligation at the respective dates hereinafter mentioned, were as follows:

On 1-30-32 (the date to which interest was last paid)	\$35,600.96
On 4-30-32	34,977.60
On 7-30-32 (the date the note fell due)	34,075.29
On 7-30-36 (the date the note outlawed)	29,355.95
On 12-31-40 (the date of the last unchallenged account)	23,921.52 [44]

VI.

It is true that prior to and during the pendency of these proceedings, sales of certain portions of the debtor's property were arranged, and that permission having been given by the Court to conclude said sales, a sum aggregating \$49,878.38, has been received by the trustee and is being held by the said trustee, subject to the order of this Court.

VIII.

The Court makes no findings as to the allegations of paragraphs IV and V of the debtor's petition for determination of amount of existing lien and encumbrance, or as to the allegations of paragraph III of the answer of Pacific States Corporation, or as to the allegation of paragraph VII of the debtor's position to the effect that the Pacific States Corporation should be required to accept in full payment a sum not greater than the appraised value of the assets accepted by the Pacific States Corporation in the compromise hereinafter referred to, less the proceeds received by Pacific States Corporation from other assets transferred to it in the compromise.

In support of the debtor's allegations, upon which no finding is made, as just stated, the debtor offered certain portions of the transcript in case No. 457,525 of the Superior Court of Los Angeles County, between the debtors, as plaintiffs and Citizens National Trust and Savings Bank of Los Angeles, Pacific States Corporation and Title Insurance and Trust Company, as defendants, which Superior Court action had reference to the note, deed of trust, and declaration of trust now under consideration by the Conciliator-Referee. In that connection where rulings were reserved, the following rulings have been made, viz.:

(a) Debtors 2-5 offered and marked for identification appearing on pages 91-99 of the Reporter's Transcript in said case No. 457,525 of the Superior Court of Los Angeles County, and being a petition of the Superintendent of [45] Banks to compromise, to the introduction of which the Pacific States Corporation objected. Objection sustained.

(b) Debtors 2-6 likewise offered and marked for identification, and appearing on page 110 of the said Reporter's Transcript, and being an order of the Superior Court of Los Angeles County, in connection with the compromise just referred to. Objection of Pacific States Corporation to the introduction of same in evidence sustained.

(c) Debtor's 2-9 likewise offered and marked for identification and appearing on pages 276 and 277 of the said Reporter's Transcript and containing testimony of A. Q. Robison given in the said Superior Court action. Motion of Pacific States Corporation to strike said testimony granted.

IX.

The allegations of paragraph I of the answer of Pacific States Corporation are untrue. All other allegations of the said answer which are contrary to these findings are likewise untrue.

X.

That the allegations of paragraph III of the creditors, Pacific States Corporation, "Petition for Order to Apply Moneys to Payment of Debt", are untrue, except that the sum of \$6,512.92 has been advanced by Citizens National Trust and Savings Bank, as is hereinafter found.

XI.

The only liens which have been asserted in this Court against said ranch property are those based upon the said deed of trust and upon declaration of trust No. 5873.

In November 1942, Citizens National Trust and Savings Bank of Los Angeles, at the request of Pacific States Corporation and of the debtors and upon the understanding that the said bank should have a [46] first lien on the trust estate for the outlay, advanced the necessary money to redeem the Hall ranch from tax sales without penalties or interest, and to pay the attorneys' fees and other expenses in connection with an action in the Superior Court of Los Angeles County to effect such redemption and said bank at the same time, and upon a like understanding as to lien rights, advanced additional money to pay the 1942-43 taxes on the lands redeemed, such advances were made upon the further understanding that the bank should receive interest at 6% per annum thereon instead of 7% as provided in the declaration of trust No. 5873.

Upon making said advances and after deducting the amount of cash which it had on hand in said trust, a balance of \$6,515.92 remained to be paid to the said bank in connection with the advances upon which sum the Laughlin from December 3rd, 1942 bank is entitled to receive interest at 6% per annum Δ unpaid repaid.

The said bank is further entitled to receive reasonable fees for acting as trustee under said Trust No. 5873 for the period from January 1, 1940 to December 31, 1942, which sum the Court fixes at \$759.70, and the

payment of said sum is secured by the lien of declaration of trust No. 5873, and pursuant to its provisions said bank as trustee is entitled to receive such further sums for acting as trustee subsequent to December 31, 1942, as this Court may adjudge to be reasonable, and which additional sum is likewise secured by the lien of said declaration of trust.

The attorneys for the said bank, Messrs. Cosgrove & O'Neil, are entitled to reasonable fees to be paid by the said bank from the trust estate, for services necessarily performed by the said attorneys at the behest of the bank in preserving and administering the trust estate. Such attorneys' services the Court finds are reasonably of the value of \$300.00 and this sum is likewise a lien upon the trust estate and secured by the terms of the said declaration of trust. [47]

Any and all interest of Phillips and Hambaugh Realty and Construction Corporation, as "Second Payee" under said declaration of trust, has been discharged. [48].

And as Conclusions of Law From the Foregoing Findings of Fact, the Court Concludes:

I.

The Court interprets the said promissory note to require the compounding of interest at the rate of 7% per annum, payable quarterly, until the maturity, and not beyond the maturity, of the said note, and to require the payment of simple interest at the rate of seven per cent

per annum for four years from the maturity date on the note, on the unpaid balance of the note on the maturity date with proper reductions of interest, on account of principal paid during the same period, the purport being that where principal is paid during the period, interest on such principal shall be computed to the date of payment only.

II.

Interest to be computed as provided in Conclusion I was not waived and Pacific States Corporation is not estopped to claim interest so computed, but, if said interest has been waived, and if said Pacific States Corporation is estopped, that equity requires the payment of interest as is set forth in paragraph I hereof.

Interest beyond four years from the maturity date of the note, even if it were otherwise allowable with which contention the Court disagrees, was waived by the Special Deputy Superintendent of Banks of the State of California in charge of the liquidation of Pan-American Bank of California, and likewise by Citizens National Trust and Savings Bank of Los Angeles, as trustee of said Trust No. 5873, and also by Pacific States Corporation.

III.

The said promissory note is a negotiable instrument. The same having been acquired by Pacific States Corporation after its maturity is subject to all defenses, de-

fects, agreements and understandings, which could have been pleaded and asserted against the [49] Pan-American Bank of California and against Citizens National Trust and Savings Bank of Los Angeles in its capacity of trustee. Said Pacific States Corporation not being a holder in due course is charged with knowledge of all such defenses and other matters affecting the right of the holder to collect the note which occurred before Pacific States Corporation became its owner.

IV.

By their conduct Citizens National Trust and Savings Bank of Los Angeles, as trustee of Trust No. 5873, and the liquidator of Pan-American Bank of California, were and are estopped to claim that interest should be allowed beyond a period terminating four years from the maturity of the note, and this estoppel applies to Pacific States Corporation, the successor in interest of Pan-American Bank of California, in liquidation.

V.

Since the debtors are in effect asking this Court to determine the amount of the lien on their property in order that they may redeem their property from such lien, it follows, in accordance with the equitable doctrines applicable thereto, that the debtors must do equity, even though the obligation to pay the note in question is barred by the Statute of Limitations, and it is the conclusion of this Court that the obligation to pay the note is barred.

To do equity in this case, it is the determination of this Court, that the debtors should pay, and the Pacific States Corporation receive, in addition to the unpaid principal of the promissory note, interest at the rate and for the period as provided in Conclusion I. Further, it is the conclusion of this Court that it would be inequitable under the circumstances of this case for the debtors to be compelled to pay interest on the unpaid balance of the note beyond four years from the maturity of the note. In addition, there should be paid all other sums, the payment of which this Court has found to be secured by the lien of the deed of trust and/or by the lien of the said declaration of trust. [50]

VI.

It is the conclusion of this Court that the consideration given or paid by the Pacific States Corporation for the note and for First Payees' interest under the declaration of trust is immaterial, and because of such conclusion, this Court ruled out all evidence on that subject.

VII.

Upon payment to Citizens Trust and Savings Bank of Los Angeles, as trustee under Trust No. 5873 of principal and interest as herein specified, and of \$6515.92 with interest at 6% from December 3, 1942, to reimburse said bank for moneys advanced to pay taxes, and upon payment of its fees as trustee, and of its attorneys' fees, hereinbefore mentioned, and any other fees and expenses which this Court may allow upon presentation

of claims therefore, it is this Court's conclusion that the said note should be cancelled and surrendered to this Court and that full reconveyances should be executed and delivered to this Court sufficient to clear the title of the trust estate from any lien or estate by reason of the previous existence of the trust deed and declaration of trust.

To effect the payment of the said obligations and the removal of the said liens recourse should be had to the cash funds on hand in the possession of Citizens National Trust and Savings Bank of Los Angeles, derived from the sales approved by this Court referred to in the Findings of Fact and also to funds, if any, otherwise derived by the trustee from the trust estate and in its possession.

An order should be made directing the immediate payment of said obligations from said funds and the cancellation and release of the said liens.

August

Dated: ~~June~~ 1st, 1944.

H. SIDNEY LAUGHLIN

Conciliation Commissioner of Los Angeles
County [51]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 22, 1944. Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. [52]

[Title of District Court and Cause]

ORDER UPON "PETITION FOR DETERMINATION OF AMOUNT OF EXISTING LIEN AND ENCUMBRANCE" AND UPON "PETITION FOR ORDER TO APPLY MONEYS TO PAYMENT OF DEBT"

Findings of Fact and Conclusions of Law having been made and filed herein relative to the petition of debtors Hall for the determination of the amount of existing lien and encumbrance upon their property, and the Court having in its findings called attention to certain errors of its minute order of date March 21, 1944, in the basic amounts of principal upon which the Court intended to allow interest,

Now, Therefore, pursuant to the Court's decision as embodied in its Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed that the debts and obligations, which are the basis for the existing liens, represented by the Deed of Trust in which Title Insurance and Trust Company is trustee, and the Declaration of Trust No. 5873 of which Citizens National Trust and Savings Bank of Los Angeles is trustee, and which are both fully described and identified in the said petition and findings, are as follows:

Present balance of unpaid principal on promissory

note of date 7-30-27

\$23,921.52

[53]

Attorneys' fees of Messrs. Cosgrove & O'Neil for services rendered Citizens National Trust and Savings Bank of Los Angeles in con- nection with Trust No. 5873, payable to said bank for the said attorneys	300.00
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Total Present Amount of Liens and Encum- brances	\$42,045.83
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[54]

It is Further Ordered, Adjudged and Decreed, that the said obligations be forthwith paid, satisfied and discharged and/or reimbursed by Citizens National Trust and Savings Bank of Los Angeles, trustee under Trust No. 5873, from the balance in its possession, approximating \$50,000.00, of the proceeds of sales of land approved by this Court, and that there be likewise paid any additional trustee's fees and expenses which this Court may approve and for which application may be made to this Court, and that the said trustee forthwith account for and pay over to this Court all remaining moneys in its hands.

It Is Further Ordered, Adjudged and Decreed that the said promissory note be forthwith cancelled and delivered to this Court and that the said trust deed and declaration of trust be likewise forthwith cancelled and that the trustees thereunder execute and deliver to this Court full reconveyances in favor of the debtors of all the remaining right, title and interest of the respective

trustees in the Trust Estate, and that the trustee under Trust No. 5873 execute such assignments as may be necessary to convey title to the debtors of all the outstanding contracts of sale and of all other trust assets of said trust still remaining in its possession and deliver the contracts, and other trust assets with the assignments thereof, to this Court.

It Is Further Ordered, Adjudged and Decreed that this Court retain jurisdiction of these proceedings and consummate all of the terms and conditions of this judgment, and for such other purpose as may be necessary for the complete administration and disposition of the bankruptcy estate.

August

Dated: ~~June~~ 1st, 1944.

H. SIDNEY LAUGHLIN

Conciliator-Referee

Conciliation Commissioner [55]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 22, 1944. Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. [56]

[Title of District Court and Cause]

PETITION FOR REVIEW OF ORDER OF CONCILIATION COMMISSIONER DATED AUGUST 1, 1944

To the Honorable H. Sidney Laughlin, Conciliation Commissioner for the Above-Entitled Debtor Estate:

The verified petition of Pacific States Corporation respectfully represents to the Court herein as follows:

I.

That heretofore and on or about the 9th day of December, 1942, the above-named purported debtors filed an original petition for relief under the provisions of Section 75 of the Bankruptcy Act. That said matter was thereafter duly and regularly referred to the Court herein.

II.

That thereafter proceedings were instituted by the said debtors to have the amount due or payable upon the encumbrance held by the Pacific States Corporation fixed and determined. That said matter came regularly on for hearing before this Court and evidence was introduced, both oral and documentary, and said matter was thereafter taken under submission by the Conciliation Commissioner herein, and there- [59] after and on or about the 1st day of August, 1944, the said Conciliation Commissioner made and entered his findings of fact, conclusions of law, and his order upon said petition; a copy thereof is attached hereto, marked "Exhibit A", and made a part hereof.

III.

That your petitioner is aggrieved by the findings, conclusions and order herein made and alleges that the same are erroneous in fact and in law, and that said order as based upon said findings and conclusions, should be reversed. That said findings, conclusions and order are erroneous in the following particulars, to wit:

(1) That the Conciliation Commissioner erred in overruling the objection to the jurisdiction of this Court to hear and determine said matter, as well as the objection to the jurisdiction of the Court over the entire proceedings, and in denying the motion to dismiss the said petition.

(2) That the Conciliation Commissioner erred with respect to his first finding, being numbered "I", that the debtors are the owners "of all that certain real property described in the schedules . . . and shown on Schedule B, page 7, as 'Ranch at Leona Valley, near Palmdale'."

(3) That the Conciliation Commissioner erred with respect to his second finding, being numbered "II", that "concurrently with the giving of the said deed of trust, a declaration of trust, for the purpose of enabling the debtors to pay their indebtedness, was entered into, which covered the said ranch property."

(4) That the Conciliation Commissioner erred with respect to his third finding, being numbered "III", that "the debtors received no cash, shares of stock or other consideration from the said corporation for the conveyance of the title of the ranch property to the said corporation", and in also finding that "the debtor, Frank D. Hall, has, at all times since the execution of the said

note and deed of trust, acted, and is now acting, as the Manager of the ranch property [60] as owner thereof", and also that "the said Farm Home Builders, Incorporated, is the alter ego of Frank D. Hall and Marguerite S. Hall", and that "the debtors maintained their family homestead at all of said times until the year 1941, on said ranch property, and the debtors have at all of said times, been in possession of, and are now in possession of, the said ranch property not sold or conveyed."

(5) That the Conciliation Commissioner erred with respect to his fifth finding, being numbered "V", that the trustee, acting under Declaration of Trust No. 5873, rendered statements "for the years 1933, 1934, 1935, 1936, 1937 and 1938" and purportedly "set forth a statement of the unpaid balance of the promissory note obligation at the beginning and ending of the accounting period", and also erred in finding that "said accounts were accepted and acted upon by the said debtor and by the said liquidator as true and correct statements of account", and further and particularly erred in finding that "for the years 1939 and 1940, the said accounts were furnished to and received by Pacific States Corporation and by the debtor, Frank D. Hall, and were accepted by them as true and correct statements of account"; and further erred in finding that "the acceptance of said accounts constituted an intention on the part of the liquidator of said Pan-American Bank of California to waive interest, and said interest was actually waived by the owner and holder of said promissory note acting in conjunction with the obligors thereunder."; and in finding that the "Citizens National Trust and Savings Bank of Los Angeles, as

trustee of Trust No. 5873, and the said liquidator of Pan-American Bank of California, would, at all times during which said liquidator was the owner and holder of said promissory note, have accepted payment of the balance shown in the current account in full satisfaction of the said note, and which facts were known to the Pacific States Corporation at the time of the transfer of the note from the said liquidator to the said creditor.”; and in further finding that “said sum of \$727.70 having been paid by debtor, Frank D. Hall, to the said [61] liquidator of Pan-American Bank of California, on August 23, 1927, and not having been previously shown on any accounts of the trustee.”; also in finding that “the statutory period for the commencement of an action at law to correct the said promissory note expired July 30, 1936, and at the time the said application was made in the year 1940, of \$363.85, towards the payment of interest, the said note was long past due and the obligation outlawed.”; and further erred in finding that “at no time prior to 1942 was any statement prepared or furnished where interest was added to principal to establish a new principal for the calculation of subsequent future interest.”; and further erred in finding that “the debtors upon receipt of the said re-computation promptly rejected it and challenged the right of the trustee and of Pacific States Corporation to re-compute the obligation.”

(6) That the Conciliation Commissioner erred with respect to his sixth finding, being numbered “VI”, that “in accordance with the accounts prepared . . . and accepted as correct by the parties in interest at all times prior to the time that Pacific States Corporation acquired

the said obligation, and also accepted by the latter corporation as to the accounts, as prepared and furnished in 1939 and 1940, the unpaid balance of the obligation at the respective dates hereinafter mentioned, were as follows:

On 1-30-32 (the date to which interest was last paid)	\$35,600.96
On 4-30-32	34,977.60
On 7-30-32 (the date the note fell due)	34,075.29
On 7-30-36 (the date the note outlawed)	29,355.95
On 12-31-40 (the date of the last unchallenged account)	23,921.52"

That said above finding is clearly erroneous in that the true and correct unpaid balance of the obligation at the respective dates hereinabove mentioned were as follows:

On 1-30-32	\$36,254.78	
Plus advance interest	634.45	\$36,889.23
	<hr/>	[62]
On 4-30-32	\$35,597.22	
Plus advance interest	622.94	\$36,220.16
	<hr/>	
On 7-30-32	35,312.52	
Plus advance interest	617.97	\$35,930.49
	<hr/>	
On 7-30-36	42,985.60	
Plus advance interest	752.24	\$43,737.84
	<hr/>	
On 12-31-40		\$48,854.02

(7) That the Conciliation Commissioner erred with respect to his ninth finding, being numbered "IX", that "the allegations of paragraph I of the answer of Pacific States Corporation are untrue. All other allegations of the said answer which are contrary to these findings are likewise untrue."

(8) That the Conciliation Commissioner erred with respect to his tenth finding, being numbered "X", that "the allegations of paragraph III of the creditors, Pacific States Corporation, 'Petition for Order to Apply Moneys to Payment of Debt', are untrue."

(9) That the Conciliation Commissioner erred with respect to his first conclusion of law, being numbered "I", that "the Court interprets the said promissory note to require the compounding of interest at the rate of 7% per annum, payable quarterly, until the maturity, and not beyond the maturity, of the said note, and to require the payment of simple interest at the rate of seven per cent per annum for four years from the maturity date on the note, on the unpaid balance of the note on the maturity date with proper reductions of interest, on account of principal paid during the same period, the purport being that where principal is paid during the period, interest on such principal shall be computed to the date of payment only."

(10) That the Conciliation Commissioner erred with respect to his second conclusion of law, being numbered "II", that "interest to be computed as provided in Conclusion I", and also that "interest beyond four years from the maturity date of the note, even if it were otherwise allowable with which contention the Court

disagrees, was waived by the Special Deputy Superintendent of Banks of the State of [63] California in charge of the liquidation of Pan-American Bank of California, and likewise by Citizens National Trust and Savings Bank of Los Angeles, as trustee under said Trust No. 5873, and also by Pacific States Corporation."

(11) That the Conciliation Commissioner erred with respect to his third conclusion of law, being numbered "III", wherein it is stated that the Pacific States Corporation acquired said promissory note after its maturity and accordingly "is subject to all defenses, defects, agreements and understandings which could have been pleaded and asserted against the Pan-American Bank of California and against Citizens National Trust and Savings Bank of Los Angeles in its capacity of trustee. Said Pacific States Corporation not being a holder in due course is charged with knowledge of all such defenses and other matters affecting the right of the holder to collect the note which occurred before Pacific States Corporation became its owner."

(12) That the Conciliation Commissioner erred with respect to his fourth conclusion of law, being numbered "IV", that "by their conduct Citizens National Trust and Savings Bank of Los Angeles, as trustee of Trust No. 5873, and the liquidator of Pan-American Bank of California, were and are estopped to claim that interest should be allowed beyond a period terminating four years from the maturity of the note, and this estoppel applies to Pacific States Corporation, the successor in interest of Pan-American Bank of California, in liquidation."

(13) That the Conciliation Commissioner erred with respect to his fifth conclusion of law, being numbered "V", wherein he recites "even though the obligations to

pay the note in question is barred by the Statute of Limitations, and it is the conclusion of this Court that the obligation to pay the note is barred.”; and wherein he further recites that the debtors should pay “interest at the rate and for the period as provided in Conclusion I. Further, it is the conclusion of this Court that it would be inequitable under the circum- [64] stances of this case for the debtors to be compelled to pay interest on the unpaid balance of the note beyond four years from the maturity of the note.”

(14) That the Conciliation Commissioner erred with respect to his seventh conclusion of law, being numbered “VII”, wherein he recites that “it is this Court’s conclusion that the said note should be cancelled and surrendered to this Court and that full reconveyances should be executed and delivered to this Court sufficient to clear the title of the trust estate from any lien or estate by reason of the previous existence of the trust deed and declaration of trust.”

(15) That the Conciliation Commissioner erred with respect to his Order adjudging and decreeing that “the debts and obligations, which are the basis for the existing liens, represented by the Deed of Trust in which Title Insurance and Trust Company is Trustee, and the Declaration of Trust No. 5873 of which Citizens National Trust and Savings Bank of Los Angeles is Trustee, and which are both fully described and identified in the said petition and findings, are as follows:

Present balance of unpaid principal on promissory note of date 7-30-27	\$23,921.52
Interest earned on the said note between 1-30-32 and the maturity date of note on 7-30-32	\$1,235.98

Less sum applied by Citizens National Trust and Savings Bank of Los Angeles on interest on 6-29-40	363.85	872.13
Total interest earned in the four years from maturity date of note on 7-30-32		9,040.58
Total unpaid principal and allowable interest on promissory note obligation, payable to Pacific States Corporation		\$33,834.23"

(16) That the Conciliation Commissioner erred with respect to his further order adjudging and decreeing "that the said obligations be forthwith paid, satisfied and discharged." [65]

(17) That the Conciliation Commissioner erred with respect to his further order adjudging and decreeing "that the said promissory note be forthwith cancelled and delivered to this Court and that the said trust deed and declaration of trust be likewise forthwith cancelled and that the trustees thereunder execute and deliver to this Court full reconveyances in favor of the debtors of all the remaining right, title and interest of the respective trustees in the Trust Estate, and that the trustee under Trust No. 5873 execute such assignments as may be necessary to convey title to the debtors of all the outstanding contracts of sale and of all other trust assets of said trust still remaining in its possession and deliver the contracts, and other trust assets with the assignments thereof, to this Court."

Wherefore, your petitioner prays that said findings, conclusions and order be reviewed by a judge of this Court in accordance with the provisions of the Act of

Congress relating to bankruptcy, and that said order be reversed, and that the Court order and direct that the proceedings herein filed by the debtors under the provisions of Section 75 of the Bankruptcy Act be dismissed for lack of jurisdiction, and that the Court also find, order, adjudge and decree that the amount due to the petitioner herein is a sum equal to the amount of the principal, less payments made, together with interest thereon at the rate of 7% per annum, compounded quarterly as provided in the note secured by the said deed of trust.

PACIFIC STATES CORPORATION

By A. Q. Robison

Secretary-Treasurer

GEORGE T. GOGGIN

Attorney for Petitioner [66]

Note: Findings of Fact and Conclusions of Law Upon "Petition for Determination of Amount of Existing Lien and Encumbrance" and Order Upon "Petition for Determination of Amount of Existing Lien and Encumbrance" and Upon "Petition for Order to Apply Moneys to Payment of Debt," attached at this point are the same as those appearing at page 20 and 39, respectively, of the Transcript of Record so are not repeated at this point. [67]

[Verified.]

[Endorsed]: Filed Sep. 29, 1944. Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. [68]

[Title of District Court and Cause]

PETITION OF DEBTORS FOR REVIEW OF OR-
DER OF CONCILIATION COMMISSIONER
DATED AUGUST 1, 1944

To the Honorable H. Sidney Laughlin, Conciliation Commissioner in the above entitled matter.

Come now the debtors, Frank D. Hall and Marguerite S. Hall, and by leave of Court first had and obtained, respectfully file this petition for review, and as grounds for review represent as follows:

I.

That heretofore and on or about July 19, 1943 the Debtors filed herein their "Petition for Determination of Existing Lien and Encumbrance", and that on July 20, 1943 Pacific States Corporation, as beneficiary, and Citizens National Trust and Savings Bank of Los Angeles, as trustee under Trust No. 5873 [69] filed a "Petition for Order to Apply Moneys to Payment of Debt"; that both said petitions being related to the same subject matter, came on regularly for hearing at the same time before the Court and evidence was introduced both oral and documentary, and the matters taken under consideration by the Conciliation Commissioner herein, and thereafter on or about the 1st day of August, 1944, the said Conciliation Commissioner made and entered his findings of fact, conclusions of law and order upon the said petition; that a copy of said findings of fact and conclusions of law is hereto attached marked Exhibit "A", and that a copy of said order is hereto attached, and marked Exhibit "B".

II.

That your petitioners are aggrieved by certain of the conclusions of law and of the order of the Court based on such conclusions, and your petitioners allege that the conclusions just referred to and hereinafter specified are erroneous in law and that the order of the Court insofar as it is based on said erroneous conclusions is against the law, and should be reversed or modified insofar as it is unlawful; and that the particulars in which said conclusions of law and said order are erroneous are as follows:

1. That the Conciliation Commissioner erred with respect to that portion of conclusion of law No. II which reads as follows, viz.:

“Interest to be computed as provided in conclusion I was not waived and Pacific States Corporation is not [70] estopped to claim interest so computed, but, if said interest has been waived, and if said Pacific States Corporation is estopped, that equity requires the payment of interest as is set forth in Paragraph I hereof.”

That said conclusion is opposed to and is not sustained by findings of facts Nos. IV, V and VI which taken together constitute a full and complete waiver of all interest and an estoppel of a right by Pacific States Corporation and Citizen's National Trust and Savings Bank of Los Angeles to claim interest upon the unpaid principal of the promissory note secured by the lien and encumbrance, from and after January 30, 1932.

2. That the Conciliation Commissioner erred with respect to conclusion of law No. IV in not concluding

that by their conduct Citizen's National Trust and Savings Bank of Los Angeles and Pan American Bank of California were estopped to claim interest prior to the period commencing four years from the maturity date of the said promissory note.

3. That the Conciliation Commissioner erred with respect to conclusion of law No. V in concluding that despite the waiver thereof, the Pacific States Corporation was entitled to receive, as a matter of equity, interest as provided in conclusion of law No. I.

4. That the Conciliation Commissioner erred with respect to his order of date August 1, 1944 in adjudging and decreeing that the following items should be included with the other items set forth in the said order, as debts and obligations forming the basis for the existing lien, viz.:

"Interest earned on the said note between

1-30-32 and the maturity date of the

note on 7-30-32

\$1235.98

[71]

Less sum applied by Citizens' Na-

tional Trust and Savings

Bank of Los Angeles on in-

terest on 6-29-40

\$363.85

\$872.13

Total interest earned in the four

years from maturity date of

note 7-30-32

\$9040.58"

That the said two items aggregating \$9912.71 were wrongfully included in said order as debts or obligations which formed the basis for the existing liens, and they should be excluded in computing the amount of said existing lien.

Wherefore your petitioners (the Debtors herein) pray that said findings, conclusions and order be reviewed by a judge of this Court, in accordance with the provisions of the Act of Congress relating to bankruptcy, and that said conclusions of law be held in error insofar as they hold that interest was not waived prior to July 30, 1936, and insofar as they hold that Pacific States Corporation and Citizen's National Trust and Savings Bank of Los Angeles are not estopped to claim interest prior to July 30, 1936, also insofar as they declare that even though said interest had been waived, Pacific States Corporation and Citizen's National Trust and Savings Bank of Los Angeles were in equity entitled to claim interest prior to July 30, 1936; and that said order be modified by the exclusion from the computation of the existing lien, of the said sum of \$9912.71 erroneously allowed as interest payable on the said promissory note.

FRANK D. HALL

MARGUERITE S. HALL

Petitioners (Debtors)

C. P. VON HERZEN

EDGAR F. HUGHES

DAVID A. SONDEL By EFH

Attorneys for Petitioners (Debtors) [72]

Note: Findings of Fact and Conclusions of Law Upon "Petition for Determination of Amount of Existing Lien and Encumbrance" and Order Upon "Petition for Determination of Amount of Existing Lien and Encumbrance" and Upon "Petition for Order to Apply Moneys to Payment of Debt," attached at this point are the same as those appearing at pages 20 and 39, respectively, of the Transcript of Record so are not repeated at this point. [73]

[Verified.]

Motion of Debtor for Relief from Default in Filing Petition is hereby granted and said Petition is ordered filed as of October 27, 1944.

H. SIDNEY LAUGHLIN
C. C.

10-23-44 HSL

[Endorsed]: Filed Oct. 27, 1944. Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. [74]

[Title of District Court and Cause]

MEMORANDUM OF DECISION

This proceeding comes before this court upon petition by Pacific States Corporation for review of the Conciliation Commissioner's order of August 1, 1944, granting debtor's petition for determination of existing lien and encumbrance on ranch property located in Leona Valley, California.

In 1927 title to the ranch property was in the debtors, Frank D. and Marguerite S. Hall, husband and wife. During that year debtors organized the Farm Home Builders Corporation which they wholly owned and controlled, and thereupon transferred the ranch property to that corporation. The Commissioner has found that the corporation is the alter ego of the debtors.

On July 30, 1937, acting through their corporation, debtors borrowed \$45,000 from Pan American Bank of California, [75] the indebtedness for which was evidenced by a five-year note providing for 7% interest compounded quarterly "from date until paid." The note was secured by a deed of trust of the ranch property and a declaration of trust wherein Pan American Bank was both trustee and beneficiary.

Pan American Bank went into liquidation proceedings on July 19, 1929 and the Superintendent of Banks of the State of California took over the assets and control of the bank. Thereafter the original declaration of trust was superseded by Trust No. 5873 in which Citizens National Trust and Savings Bank was named as trustee and Pan American Bank as beneficiary. In 1939 the Superin-

tendent of Banks assigned the beneficial interest in Trust No. 5873 to petitioner, Pacific States Corporation, in settlement of a claim of petitioner against Pan American Bank.

On December 9, 1942 debtors filed a petition as farmers for proceedings under §75 of the Bankruptcy Act [11 U. S. C. §203], listing the Leona Valley ranch property in their schedule of property owned. The petition was approved and the matter referred to H. Sidney Laughlin, Esquire, as Conciliation Commissioner.

Pacific States Corporation then filed a motion to dismiss the petition upon the ground that debtors were not farmers and were not the owners of the ranch property set forth in their petition. This motion was denied by the Conciliation Commissioner, and no petition for review of that order was ever taken. [76]

Unable to secure an agreement to a composition, debtors petitioned under §75(s) for adjudication as bankrupts. They were thereupon adjudged bankrupts, and an order of general reference was then made to Conciliation Commissioner Laughlin.

Citizens Bank then presented a motion to dismiss the proceedings upon the ground that debtors were not farmers; and also presented a petition for dismissal and a motion to strike the description of the Leona Valley property from the schedules, upon the ground that Citizens Bank, and not the debtors, was the owner of the real property in question.

The Commissioner held that his previous order on the motion for dismissal made by Pacific States Corporation was res judicata as to Citizens Bank and dismissed its

petition and motions. Upon petition for review, this order was affirmed by my colleague, Judge O'Connor.

Debtors then filed their petition for a determination of the existing lien and encumbrance on the ranch property. It is the Commissioner's order on that petition which is drawn in question by the petition for review at bar.

Petitioner, Pacific States Corporation, again contended that this court has no jurisdiction over the matter as the debtors are not farmers nor owners of the ranch property. The Commissioner overruled the objection and denied petitioner's motion to dismiss debtors' petition.

Clearly there had been a previous adjudication by the [77] Commissioner of petitioner's contention. Petitioner could have filed a petition for review of the Commissioner's denial of the first motion for dismissal of the proceedings. Having failed to do so, petitioner will not be heard to raise the same questions by motions to dismiss subsequent petitions by the debtors in the same proceeding.

The Commissioner found that petitioner's promissory note was barred by the statute of limitations on July 30, 1936, four years after maturity. But petitioner contends that the debt was revived (1) by debtors' statements in a verified complaint filed in an action by debtors against Citizens Bank in the Superior Court for Los Angeles County California; and (2) by debtors' acceptance of a 1940 statement of account, rendered by the Citizens Bank, in which a payment made prior to maturity of the note was recorded as a payment of principal and interest.

Section 360 of the California Code of Civil Procedure provides that: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title (statute of limitations), unless the same is contained in some writing, signed by the party to be charged thereby."

The law in California appears settled that the essentials of an acknowledgment are: "The distinct and unqualified admission of an existing debt, contained in a writing [78] signed by the party to be charged, and without intimation of an intention to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same." [Southern Pacific Co. v. Prosser, 122 Cal. 413, 415, 52 P. 836, 837, 55 P. 145, 146 (1898); Wilson v. Walters, 66 Cal. App. (2d) 1, 151 P. (2d) 685 (1944).]

"A declaration in writing, in whatever form of language it may be made, cannot revive a right of action once barred, unless it involves an express promise to pay the debt, or an acknowledgment from which the law will imply a promise." [Visher v. Wilbur, 5 Cal. App. 562, 91 P. 412, 414 (1907).]

Moreover, it has been expressly held that an admission of indebtedness in a complaint is not a sufficient acknowledgment within the requirements of §360 of the Code of Civil Procedure. [Roper v. Smith, 45 Cal. App. 302, 187 P. 454 (1919).]

There is ample evidence to sustain the Commissioner's findings of fact on this question. So in view of the law of California as set forth above, it was not error to hold the note to be outlawed by the statute of limitations.

However, inasmuch as debtors seek equity, they must do equity, regardless of the bar of the statute. Accordingly, the Commissioner held that debtors must pay petitioner the [79] unpaid principal of the promissory note with 7% interest compounded quarterly until July 30, 1932 (the maturity date), 7% simple interest until July 30, 1936 (the date on which the note was barred by the California statute of limitations), but without interest thereafter.

Petitioner now contends that since the note provided for 7% interest compounded quarterly "from date until paid," the Commissioner erred in not holding that debtors must pay the contract rate of interest until date of the Commissioner's order.

The Commissioner found that Citizens Bank in its capacity as trustee prepared and rendered accounts of all collections, disbursements and distributions during the years 1933-1940, inclusive, and that each account set forth a statement of the unpaid balance of the promissory note obligation; that these accounts did not set forth any charge for or payment of interest; that the accounts were furnished to debtors and to the state officials in charge of the liquidation of the Pan American Bank, and were accepted by them as true and correct; that acceptance of the accounts evidenced an intention on the part of the liquidator of Pan American Bank to waive interest, and interest was so waived. As conclusions of law from these findings of fact, the Commissioner held

that Citizens Bank, as trustee, and the liquidator of the Pan American Bank were estopped to claim interest after July 30, 1936, and that this [80] estoppel applied to petitioner.

There is ample evidence to sustain the Commissioner's findings and there is no error in the conclusions of law drawn therefrom. Indeed, it was not necessary to find that petitioner is estopped to claim interest, since both the principal obligation and all interest became barred by the California statute of limitations on July 30, 1936.

But it is urged that because the promissory note stipulated 7% interest compounded quarterly "until paid," the interest rate should not have been reduced from compound to simple for the four years between maturity and the running of the statute of limitations.

Interest after maturity is often not a contract obligation. Where provision for interest has been entirely omitted from a promissory note, interest after maturity has been allowed on the theory that the interest then is in the nature of damages. [Puppo v. Larosa, 194 Cal. 717, 230 P. 439 (1924).]

However, in providing for interest as damages, §3289 of the California Civil Code states: "Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation." And the weight of authority is that where the rate of interest is

specified in the note, that rate continues after maturity and until [81] paid. [3 Ruling Case Law, p. 900.]

Thus in the case at bar, where the language of the note specifically provides for interest "until paid," it would seem that the contract rate of interest should be applicable after maturity. However, the right to that interest became barred with the expiration of the four-year period prescribed by the statute of limitations.

Thus the amount of both interest and principal which debtors must pay to remove the lien on their ranch property rests within the sound discretion of the Commissioner, whose duty it is to determine what "equity" debtors must do in order to receive "equity." The Commissioner might well have omitted any provision for interest after maturity, or he might have seen fit under the circumstances to allow the contract rate of interest until the date of his order. Since the whole obligation was barred, petitioner was not entitled to anything as a matter of right.

The Commissioner's order is not to be disturbed unless there has been a clear abuse of discretion. I find that the Commissioner acted well within the bounds of his discretion. Therefore, the order of August 1, 1944 will be affirmed.

November 14, 1946.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed Nov. 14, 1946. [82]

In the District Court of the United States
Southern District of California, Central Division

No. 41731-WM In Bankruptcy

In the Matter of

FRANK D. HALL and MARGUERITE S. HALL,
Husband and Wife,

Debtors.

ORDER OF JUDGE ON PETITION FOR REVIEW
OF COMMISSIONER'S ORDER OF AUGUST
1, 1944

Upon the petition for review of Pacific States Corporation filed September 29, 1944; and upon the certificate of the Conciliation Commissioner filed June 5, 1946; and upon all proceedings had before the Commissioner as appears from his certificate; and upon hearing counsel for the parties;

It Is Ordered that the order of the Conciliation Commissioner dated August 1, 1944, granting debtors' petition for determination of existing lien and encumbrance on certain ranch property situated in Leona Valley, California, be and is hereby confirmed;

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to

(1) The Conciliation Commissioner, H. Sidney Laughlin, Esquire [83]

(2) The attorneys for the petitioner, and

(3) The attorneys for the debtors.

November 14, 1946.

WM. C. MATHES

United States District Judge

Judgment entered Nov. 14, 1946. Docketed Nov. 14, 1946. Book 10, page 55. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

[Endorsed]: Filed Nov. 14, 1946. [84]

[Title of District Court and Cause]

NOTICE OF APPEAL

To: Frank D. Hall and Marguerite S. Hall, husband and wife, Debtors, and to C. P. Von Herzen and Edgar F. Hughes and David A. Sondel, their attorneys:

Notice Is Hereby Given that Pacific States Corporation, a corporation, petitioner in the above-entitled action, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that portion of the order made and entered in the above-entitled matter on November 14, 1946, by the Honorable William C. Mathes, which provides as follows:

“It Is Ordered that the order of the Conciliation Commissioner, dated August 1, 1944, granting debtors’ petition for determination of existing lien and encumbrance on certain ranch property situated in Leona Valley, California, be and is hereby confirmed.”

No appeal is taken from said order insofar as it provides, by affirming the aforesaid order of the Conciliation Commissioner, that said Debtors shall pay to petitioner at least GTG EME

the sum of \$33,834.23, [85] although petitioner does not admit the correctness of the method of computation of said amount in the findings and conclusions of the Conciliation Commissioner made and entered August 1, 1944, and in the aforesaid order of the Conciliation Commissioner made and entered August 1, 1944.

Dated this 10th day of December, 1946.

GEORGE T. GOGGIN

Attorney for Appellant [86]

[Affidavit of Service by Mail.]

[Endorsed]: Filed and mailed copy to C. P. Von Herzen, et al., attys. for debtors, Dec. 10, 1946. [87]

[Title of District Court and Cause]

STIPULATION

It Is Hereby Stipulated between appellant Pacific States Corporation, through George T. Goggin, Esq., its attorney, and Frank D. Hall and Marguerite S. Hall, appellees herein, through C. P. Von Herzen, Edgar F. Hughes and David A. Sondel, Esquires, their attorneys, that the Reporter's Transcript of the Proceedings in the District Court, and each and all of the exhibits designated in appellant's designation of record on appeal, and such other exhibits as may be designated by appellee in addition thereto, shall be transmitted in their original form, in lieu of copies, to the Circuit Court of Appeals for the 9th Circuit on the appeal of the above entitled case; and that appellees may use the appellant's copy of the Reporter's Transcript.

Dated: December 20, 1946. [88]

GEORGE T. GOGGIN

Attorney for Pacific States Corporation

C. P. VON HERZEN

EDGAR F. HUGHES and

DAVID SONDEL

By C. P. Von Herzen

Attorneys for Frank D. Hall and Marguerite
S. Hall

[Endorsed]: Filed Dec. 27, 1946. [89]

[Title of District Court and Cause]

STIPULATION

It Is Hereby Stipulated between appellant Pacific States Corporation, through George T. Goggin, its attorney, and Frank D. Hall and Marguerite S. Hall, appellees herein, through C. P. Von Herzen, Edgar F. Hughes and David A. Sondel, their attorneys, that Volumes I and II of the Reporter's Transcript and each and all of the exhibits designated in appellant's Designation of Record on Appeal shall be transmitted in their original form, in lieu of copies, to the Circuit Court of Appeals for the Ninth Circuit, on the appeal of the above entitled case.

Dated: December 20, 1946.

GEORGE T. GOGGIN

Attorney for Pacific States Corporation

C. P. VON HERZEN

EDGAR F. HUGHES and

DAVID SONDEL

By C. P. Von Herzen

Attorneys for Frank S. Hall and Marguerite
S. Hall [90]

[Endorsed]: Filed Dec. 27, 1946. [90]

[Title of District Court and Cause]

ORDER

Good Cause Appearing Therefor, It Is Hereby Ordered, Adjudged and Decreed that Volumes I and II of the Reporter's Transcript and each and all of the exhibits designated in Appellant's Designation of Record on Appeal and such other exhibits as may be requested by the appellee, shall be transmitted in their original form, in lieu of copies, to the Circuit Court of Appeals for the Ninth Circuit, on the appeal of the above entitled case.

Dated: December 24, 1946.

WM. C. MATHES

Judge of the United States Court

[Title of District Court and Cause]

STATEMENT OF POINTS ON WHICH APPELLANT WILL RELY ON APPEAL

Appellant respectfully intends to rely upon the following points on its appeal:

I.

Appellant is entitled to seven per cent (7%) interest compounded quarterly on the principal sum of \$45,000.00, with any interest not paid when due becoming part of the principal and thereafter bearing like interest, from July 30, 1927 until the entire balance shall have been paid by appellees, less amounts heretofore paid on account of principal and interest.

II.

The prior action in the California state courts between appellees and appellant, Hall v. Citizen's National Trust and Savings Bank et al., Los Angeles Superior Court No. 457 525, 53 Cal. App. 625, Hearing in Supreme Court denied,—is *res judicata* herein that: [92]

a. The note of July 30, 1927, and deed of trust dated same day securing same as well as declaration of trust No. 5873 dated December 2, 1929 are valid and in full force and effect, and are owned by appellant.

b. Said obligation is not barred by the statute of limitations.

c. Said obligation is not unenforceable by reason of any waiver or estoppel.

d. Appellant is entitled to proceed forthwith to a trustee's sale of the real property in question under the afore-said deed of trust and declaration of trust, unless appellees shall forthwith deposit with the Court in the instant case a sum equal to that described in Point I of these Points to be relied on on appeal.

III.

The power of sale under the said deed of trust is not barred by the statute of limitations.

IV.

The trustee's power of sale under the said declaration of trust is not barred by the statute of limitations.

V.

Even if the statute of limitations has run against an action for money due on the note herein secured by deed

of trust on real property and declaration of trust on same, appellees cannot clear title to said property or redeem the same without payment of full amount of principal and interest due thereon to date.

VI.

The allowance of interest in the amount set forth in Point I is mandatory, and not discretionary.

VII.

The order of the District Court herein constitutes a deprivation of appellant's property without due process of law in violation of the Constitution of the United States. [93]

VIII.

Even if the allowance of interest in the amount described in Point I above be deemed discretionary, the failure to allow such amount herein was an abuse of discretion.

IX.

Even if the statute of limitations had run on the aforesaid note prior to 1940, the payments made on account of principal and interest in that year, and the acceptance by appellees of the trustee's annual statement of that year showing the same, revived the debt and all interest thereon up to said date and for four years thereafter. Since the within proceedings were begun within said four year period, and since the statute of limitations is tolled during the pendency of the within proceedings, the said note is still in full force and effect and is not barred by the statute of limitations.

X.

Appellees do not have a sufficient interest in the real property in question to maintain the within proceedings under Section 75 of the Bankruptcy Act.

XI.

Appellees are not entitled to maintain the within proceedings under said Section 75 of the Bankruptcy Act of the United States because they were not farmers within the meaning of the Act on the date of filing their petition starting these proceedings.

XII.

There is not sufficient evidence to establish any waiver by appellant of any principal or interest on the said note of July 30, 1927; nor is there sufficient evidence of any such waiver by the predecessors in interest of appellant in such manner as to bind appellant.

XIII.

There is not sufficient evidence to establish any estoppel dis-entitling appellant to payment of full principal and interest on said note; nor is there sufficient evidence of any such estoppel by [94] the predecessors in interest of appellant of such nature as to bind appellant.

Respectfully submitted,

GEORGE T. GOGGIN

Attorney for Appellant

[Endorsed]: Filed Dec. 18, 1946. [95]

[Title of District Court and Cause]

COMPOSITION AND EXTENSION PROPOSAL

Come now the debtors, Frank D. Hall and Marguerite S. Hall, and make the following proposal of composition and extension to their creditors:

I.

(1) Debtors' first proposal is based upon a cash settlement with Pacific States Corporation, the assignee, of the promissory note secured by Deed of Trust and Declaration of Trust on debtors' property.

(2) Debtors offer to said creditor, Pacific States Corporation, the sum of \$45,000.00 cash, to be paid within four months from date hereof, failing which, the proceeding is to be dismissed and the creditor restored to such civil remedies as it desires to pursue.

(3) Debtors propose to pay all other creditors, whether existing at the time of the filing of the petition or since, in cash, whatever sums may be proven to be owed them. [101]

II.

As an alternate proposal to the foregoing, the debtors propose an extension plan as follows:

(1) Debtors propose to have all proceedings now pending or contemplated, looking to a foreclosure upon their real property or to enforce any obligation against them, stayed to and including August 1, 1947.

(2) During said period debtors propose to intensively farm the real property owned by them and to grow and

produce crops thereon, all moneys to be deposited in a separate bank account of the debtors requiring the counter-signature of the Conciliation Commissioner, and only such sums to be spent as are necessary or proper for the adequate maintenance and care of the property and the production of crops thereon.

(3) From the fund so created the debtors propose to pay the Conciliation Commissioner's fees, expenses, and charges, and any costs and attorney's fees in this proceeding, the balance thereof, subject to a reasonably adequate budget to enable the debtors to continue the production of crops upon said property, the debtors propose to pay to the creditor Pacific States Corporation. In any event, debtors propose to pay the current taxes levied against the real property prior to delinquency.

(4) At the conclusion of the second year of farming operations, the debtors propose to pay to the creditor Pacific States Corporation, five per cent of the principal amount due it; and at the end of the third year's farming operation, the debtors propose to pay said creditor an additional five per cent of the principal due it; and the balance of said obligation to be paid on or before August 1, 1947. During the extension period the debtors propose to pay to the creditors, Pacific States Corporation, interest at the rate of four per cent per annum, payable annually, commencing August 1, 1944. [102]

(5) Inasmuch as a dispute of a substantial character exists with respect to the present unpaid balance due

upon the debtors' obligation now owned by the Pacific States Corporation, the debtors propose under this extension agreement to recognize the principal unpaid balance to be \$50,000.00, which shall be the amount to which said creditor Pacific States Corporation shall be entitled, with interest, as above provided.

(6) Debtors propose to pay all other creditors whether existing at the time of the filing of the petition or since as follows: To creditors existing at the time of the filing of the petition such sums as may be proven to be owed them in cash four years from date hereof, together with interest thereon at the rate of two per cent per annum; to creditors that have become such since the filing of the petition such sums as may be proven to be owed to them as the same become due.

Dated: April 1, 1943.

FRANK D. HALL

MARGUERITE S. HALL

Debtors

C. P. VON HERZEN

Attorney for Debtors [103]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 2, 1943. Conciliation Commissioner.

[Endorsed]: Filed Jan. 20, 1947. [104]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 104, inclusive, contain full, true and correct copies of Debtor's Petition Under Section 75 of the Bankruptcy Act; Approval of Debtor's Petition and Order of Reference; Petition for Adjudication Under Section 75-s of the Bankruptcy Act; Orders for Adjudication and of General Reference Under Section 75-s; Notice of Filing of Commissioner's Certificate on Review; Certificate of Conciliation Commissioner on Review of Order Dated August 1, 1944; Petition for Determination of Amount of Existing Lien and Encumbrance; Answer of Pacific States Corporation to Petition for Determination of Amount of Existing Lien and Encumbrance; Petition for Order to Apply Moneys to Payment of Debt; Answer to Petition for Order to Apply Moneys to Payment of Debt; Findings of Fact and Conclusions of Law Upon Petition for Determination of Amount of Existing Lien and Encumbrance and Upon Petition for Order to Apply Moneys to Payment of Debt; Order Upon Petition for Determination of Amount of Existing Lien and Encumbrance and Upon Petition for Order to Apply Moneys to Payment of Debt; Two Orders Extending Time Within Which Pacific States Corporation May Prepare and File Its Petition for Review Herein; Petition of Pacific States Corporation for Review of Order of Conciliation Commissioner Dated August 1, 1944; Petition of Debtors for Review of Order of Conciliation Commissioner Dated

August 1, 1944; Memorandum of Decision; Order of Judge on Petition for Review of Commissioner's Order of August 1, 1944; Notice of Appeal; Two Stipulations re Transmittal of Original Exhibits, etc.; Order for Transmittal of Original Exhibits and Reporter's Transcript; Statement of Points Upon Which Appellant Will Rely on Appeal; Designation of Record on Appeal by Pacific States Corporation; Affidavit of Service of Statement of Points and Designation of Record; Stipulation and Order Extending Time to File Record and Docket Appeal and re Record on Appeal and Composition and Extension Proposal which, together with Two Volumes of Original Reporter's Transcript and Original Petitioner's Exhibits 1, 6, 8 and 9; Original Pacific States Exhibits 2A, 2AA, 2B, 2C, 2D, 2F, 2G and 2I; Original Citizen's Bank Exhibit 4 and the Original of a Portion of Debtor's Exhibit 2-4, to-wit, statement of Citizens National Trust and Savings Bank for the period from January 1, 1940 to December 31, 1940, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$26.20 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23 day of January, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke
Chief Deputy Clerk

[Title of District Court and Cause]

Hon. D. Sidney Laughlin, Conciliation Commissioner

REPORTERS' TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON HEARINGS

* * * * *

Los Angeles, California, January 29, 1943; 10:00 A. M.

The Commissioner: Did we have a reporter the last time?

Mr. North: No, we did not. I was told it would be permissible if we made the arrangement. Is that satisfactory?

The Commissioner: That is correct. That is correct. The arrangement is made as a private matter. However, at a later date, upon proper application, the matter for reimbursement can be considered. However, I am not holding out that there will be a reimbursement.

Mr. North: No.

The Commissioner: But I stated that in several of these cases.

Mr. North: If Your Honor please, I have served notice I desired to file a supplemental memoranda of points and authorities at this time, if I may.

The Commissioner: Very well. Now, the record will show that this is a continuation of the first meeting of creditors, which was first called for January 20, 1943, pursuant to notice over my signature as Conciliation Commissioner, dated December 30, 1942, and jurisdiction of the court is retained, and at the present time we are continuing upon the jurisdictional point as to whether

or not the debtor is a "farmer" within the meaning of the Act.

The record shows that Frank D. Hall, the debtor, was [2*] on January 20th duly sworn and examination started; it was stipulated in open court that the creditor, Pacific States Corporation, which had filed its petition for a dismissal, would assume the burden of proof, and witnesses were called on behalf of the petitioner in pursuant thereto. The petitioner had not completed its order of proof and by stipulation examination was conducted of the debtor by his counsel of record. That examination in itself, has not been completed, and at the suggestion of the court was stopped in order to allow certain out-of-town witnesses to testify on behalf of the petitioner, Pacific States Corporation. The proceedings were adjourned while this proof was being put on by the said petitioner, Arnold Munz, being the last witness called on direct examination and there was no cross examination, which brings the matter up to the point of today's proceedings.

Is that a correct statement of what has transpired, gentlemen, up to the present time?

Mr. Von Herzen: I believe that is correct, Your Honor.

The Commissioner: Very well. Proceed.

Mr. North: I would like to question Mr. Hall, if the Court please, further, and I may cover some of the ground that has been covered, but I will try not to do so in detail or at great length.

The Commission: Well, I will allow some repetition due to the fact that there was no reporter before and you,

*Page number appearing at top of page of original Reporter's Transcript.

of [3] course, will be permitted to ask leading questions; if they become too leading and placing words in the witness' mouth, or attempting to, I will stop them, or adverse counsel will too, but I think in the interest of time it may be understood you may do that. [4]

* * * * *

FRANK D. HALL,

recalled, being first duly sworn, testified further as follows:

* * * * *

Direct Examination [5]

* * * * *

Q. By Mr. North: I will ask Mr. Hall whether or not during the hearing in the Superior Court, of that Superior Court case, you did not testify as follows:—

Mr. Von Herzen: The page and line, please?

Mr. North: Page 232, lines 11 to 18. I will make it [54] to the question as in line 6 to 18:

“Q. Well, I am trying to get Mr. Hall an idea of the average number of times a week you have been on the property since that date?”

Now, the date, Your Honor, was February 9, 1939.

Mr. Von Herzen: Start at line 1.

(Testimony of Frank D. Hall)

Mr. North: All right. We will start at line 1. I will start at line 2 where the question begins:

“Q. How much of the time since February 9, 1939, have you actually been on the property?”

A. That is rather a hard question, asking a man who lives on it; I have been there lots of times; all over it.

Q. Well, I am trying to get Mr. Hall an idea of the average number of times a week you have been on the property since that date?

Mr. Sondel: I cannot see how that is material. It has been gone over at least three or four times.

The Court: I do not think that particular question has been asked. The objection is overruled. Can you answer?

A. Well, between this date in 1939 and this so-called stop letter that you have here, whether I was on the property, was not on the property, in any particular day or time, I was working hard in an effort to make sales. I was not farming it. [55] I was trying to sell it.”

Did you so testify? A. Yes, sir.

Q. You did? Now, Mr. Hall—

The Commissioner: He said that as of what period?

Mr. Von Herzen: February 9, 1939.

The Witness: It was renting for pasture at that time.

The Commissioner: Just a moment. Just a moment.

Mr. North: From February 9, 1939, until the hearing, which was about 1940, November, I believe, was it not, Mr. Hughes? I believe I can get the exact date

(Testimony of Frank D. Hall)

here, Your Honor, of that statement. It was in February, 1941, when that statement was made.

The Commissioner: Well, let me understand this. This testimony which counsel just read, Mr. Hall, you stated that between February 9, 1939, and up until November of 1940—is that correct?

Mr. North: February, 1941.

The Commissioner: 1941 That you were not trying to farm your property, you were trying to sell it?

The Witness: Yes, sir.

The Commissioner: That is what you said?

The Witness: That is farming, as far as planting is concerned, it was under lease, the same as I have testified that time for grazing and bees.

The Commissioner: But you said you were not trying [56] to farm it, you were trying to sell it?

The Witness: Yes.

The Commissioner: Prior to that time you had been out working the soil yourself; is that right?

The Witness: That is right. I had an agreement with the Bank Commissioner at that time that he would reduce the price and I would do everything I could to get some money in there, so I got busy.

The Commissioner: Well, had the bank asked you to sell your property?

The Witness: Oh, yes. He was asking me all the time to hurry up and get all the sales I could in there so we could reduce this total, that he could give me good cooperation at all times and tried in every way to O.K. all my sales, and got all the help to me that he could so I could make sales and decrease the total amount due.

(Testimony of Frank D. Hall)

The Commissioner: Was that the same thing that you were trying to do from November, 1941, up to the date of filing these proceedings in 1942? Still trying to do the same thing?

The Witness: The same thing. Well, no, I had been under restraint; I couldn't do it; but I have been trying to sell the whole thing, or enough to pay off the obligation, yes. I have not been trying to make individual sales because, as I testified, I have not been actually planting ground, or having it planted, on account of the time it takes, [57] and it has been rented all the time, running cattle on it, and in doing what I thought was the surest and best way that I could do on it under the circumstances.

The Commissioner: You were trying to sell it to pay off the indebtedness? Is that it?

The Witness: Yes, sir, at all times. [58]

* * * * *

The Commissioner: We are getting away from my question asked about '39, '40, '41 and '42. You told me during the year 1938 somebody got \$520.00.

Mr. Von Herzen: Mr. Hall got \$520.00.

The Commissioner: For services rendered in selling certain property? This property? Is that right?

Mr. Von Herzen: Your Honor, Mr. Hall in rendering that service, he would have had, for example, to report it as income.

The Commissioner: Yes.

Mr. Von Herzen: Now, when a person sells their own property the rule, at least for income tax purposes,

(Testimony of Frank D. Hall)

is, that is not income, unless it be in excess of the cost of the property. Now, that is the primary rule, if it exceeds the cost upon March 13, 1916, it is income, and if it does not exceed that it is not income.

Now, I am willing and I have here the figures for 1938, '39, '40, '41 and '42, as to the money that he received, which he could have used, for example, to play the horses with, or buy hamburgers with, or anything else. In other words, it went into his pocket.

The Commissioner: Yes.

Mr. Von Herzen: And whether it was income or principal, I am certainly not going to be willing to stipulate that that is income.

The Commissioner: Well, that is all right. I don't [79] care which it is as far as my question is concerned. When I talk about "income" I perhaps should use the word "revenue". In other words, I want to know where he got the money to live on. You say he got \$520.00 from this source in 1938?

Mr. Von Herzen: That is right.

Mr. North: We contend he got \$2,042.25 from the same source that year.

The Commissioner: I will come back to you and we will compare figures.

Mr. Von Herzen: In 1939 it was \$1,087.50.

The Commissioner: All right.

Mr. Von Herzen: In 1940 it was nothing; in 1941 it was nothing, and in 1942 it was nothing.

Q. By Mr. Von Herzen: Am I right on those last three years, Mr. Hall?

The Witness: Yes.

(Testimony of Frank D. Hall)

Mr. Von Herzen: Now, the bank figures—

The Commissioner: Wait a minute.

Mr. Von Herzen: —for the same year—

The Commissioner: Just a minute.

Mr. Von Herzen: Pardon me. I just took out five years back, Your Honor. I didn't go back to 1930. The bank figures—would Your Honor like to have those?

The Commissioner: I will in a minute, after I get this note made here. You contend that is money received or paid to him under the terms of the trust agreement from [80] proceeds of the sale of the property?

Mr. Von Herzen: That is right.

The Commissioner: That is as far as you go?

Mr. Von Herzen: Yes, for the sale of his own property.

The Commissioner: Now, we are talking about 1938 to 1942, for the same period of time what do you say the figures are, Mr. North?

Mr. North: 1938, \$2,042.25.

Mr. Von Herzen: The bank figures are \$2,029.00. I don't know where you got the other two fifty.

Mr. North: 1939, \$1,972.50.

Mr. Von Herzen: We agree on that.

The Commissioner: Go ahead.

Mr. North: 1940, we have no record that Mr. Hall received any commissions.

(Testimony of Frank D. Hall)

The Commissioner: '41? That is 1940? Now, what about '41?

Mr. North: No.

The Commissioner: Nothing in '41?

Mr. North: Nothing. Nothing after the notice of default was served, Your Honor, and that was served in '40, and no sales of the property were permitted after that time. [81]

* * * * *

O. E. HORSTMANN,

called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

[90]

* * * * *

Q. By Mr. North: Mr. Horstmann, does the bank have any records indicating what money has been received by the agent in the sale, in this instance Mr. Hall, in the sale of the various portions of the property? Wasn't the agent required to make a receipt right on the transaction itself?

The Witness: Well, as I explained, in his reports of sale the deal was outlined, forwarded to the bank, his portion having been retained by him as his commission.

Q. That was the arrangement?

A. He was entitled to a certain percentage which he withheld.

Q. That percentage was thirty, or was it, or do you know?

A. I believe so.

(Testimony of O. E. Horstmann)

Q. Thirty? Now, if the down payment was no more than 30 per cent, the arrangement was Mr. Hall should retain it; is that correct? A. That is correct.

Q. And if it was greater than 30 per cent then he would deliver to the bank the surplus over 30 per cent, and retain the thirty; is that right?

A. That is right.

Q. Or if it was under—this down payment was under 30 per cent, he would be entitled to retain all that he got. [96] and then could later, from some other source, the difference between what he got and 30 per cent; is that correct?

A. That is correct, he would get the difference as payments were made under the contract and his pro rata share was taken. [97]

* * * * *

Q. All right. Now, commencing with 1930 will you tell us right up through 1939 the amounts that are shown for each year as having been received by Mr. Hall, either in cash or as a credit?

A. These are the credits made to "F. D. Hall, Agent's Account".

Q. All right. 1930? [100]

A. Regardless of whether they are cash.

The Commissioner: It is understood those are, the credits, at least, according to the sales which he reported were made? Is that right?

The Witness: Correct.

The Commissioner: All right.

(Testimony of O. E. Horstmann)

The Witness: 1931, \$3,729.11. 1931, \$4,465.30; 1932, \$2,412.01; 1933, \$274.59; 1934, \$591.00; 1935, \$142.00; 1936, \$1,473.30; 1937, \$530.00; 1938, \$2,426.25; 1939, \$1,972.50.

Q. By Mr. North: You have the total of those payments?

The Witness: The total of those payments \$17,632.06.

Mr. North: That is all. [101]

* * * * *

FRANK D. HALL,

recalled.

Further

Direct Examination [111]

* * * * *

Q. By Mr. North: I will ask whether or not in April of 1941 you did not testify as follows—page 157, Gentlemen,—

“Now, in addition to having consummated these sales reflected in this Exhibit 7, what other work did you do, if any, during 1939, in an effort to make sales of the property up there, or in regard to the project, from time to time?

A. I kept advertising and calling on prospects, and spent all my available time that I could possibly put in, running back and forth after people trying to work up business.”

Q. Did you so testify?

Mr. Von Herzen: If Your Honor please, I object to that.

(Testimony of Frank D. Hall)

The Commissioner: Just a minute.

Mr. Von Herzen: I object to that. I object to the [112] question.

The Commissioner: How?

Mr. Von Herzen: I object to the question altogether because it is completely unimpeaching; there is nothing in that question whatever—I will show the record to Your Honor so Your Honor can follow it better. If Your Honor will glance at that there is absolutely nothing impeaching in that question. We have to go out of our way tremendously to say there is anything contrary in that to anything that he has testified to here impeaching the witness, if Your Honor please, you are attempting to prove that the witness, in effect, you are attempting to prove that the witness is untruthful, and I submit that it should not be done in a manner such as this where it is completely compatible with everything that the witness said.

Mr. North: If Your Honor please, this witness has continually, throughout this hearing, repeated that he spent a large portion of his time visiting the property, conferring with others on grazing, doing these various other farming activities.

Mr. Von Herzen: And I challenge that statement to contain anything to the contrary.

The Commissioner: I am going to allow the question. Objection overruled, because I have well in mind what the testimony is.

Q. By Mr. North: Didn't you so testify? [113]

A. Yes, sir.

(Testimony of Frank D. Hall)

Q. Then on page 201, Mr. Von Herzen, at the same time did you testify in this manner:— On page 200 first—the question is:

“Q. Well, you would say since 1937, for instance, you have lived on this property? A. Oh, yes.

Q. You have? A. Oh, yes, absolutely.

Q. Spent your time there? A. No, I spent my time, most of it, running around trying to make sales and looking for prospects for sales. I couldn't sell anything up there, because people don't come up there to buy them; you have to go out and get them.

Q. And since 1937 you have spent the larger part of your time going out and getting purchasers for this property? A. Yes, sir.”

Q. Did you so testify? A. Yes, sir.

Q. Turning to page 206, Mr. Von Herzen:

“Q. Up to November of last year?

A. Yes, I was on the property.

Q. You were on the property at least once a week?

A. Yes, sir. [114]

The Court: Where were you the rest of the time?

A. Well, I was there sometimes for quite a while, and sometimes I would be down here running around trying to make sales. I wasn't engaged in anything else; I did all I could to—

Q. Your answer is that you were on the property, but when you were not there, you went there at least once a week? A. Yes, sir.

Q. And what were you doing the rest of the time?

A. Down here endeavoring to work up prospective sales, to get buyers.”

Q. Did you so testify? A. Yes, sir.

(Testimony of Frank D. Hall)

Q. Turning to page 211, I will ask you whether or not you testified thus:

“A. I seen there wasn’t any use to have two offices; I had one at my house, and there was no use to have a tract office, and most of my prospects were gotten down here, and I took them up there and made appointments with them.”

Skiping down to line 24:

“Q. Since February 9, 1939, have you had a sales office in your house on the property?

A. Well, I don’t know just what you mean ‘a sales office’. When I had an appointment with them, I took [115] them up there to see the land, and I would talk with them there at the house.

Q. Do you have any indication on the house in sign form, or in any form?

A. Yes, there is a sign on the house ‘Office’.

Q. Is that what the sign says, just ‘Office’?

A. Yes, sir.

Q. And you had that on there since 1939?

A. Yes, sir.

The Court: And how long prior?

A. A long time.

Q. A week, a month, several years?

A. Yes, since—

Q. Since the first amendment?

A. Since the beginning of the trust.”

Q. Did you so testify? A. Yes, sir.

The Commissioner: What kind of a sign was this you are talking about?

Mr. Von Herzen: A sign that says, “Office”. [116]

* * * * *

CARL P. SMITH,

called as a witness in behalf of the Movant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. North: [159]

* * * * *

Q. Has the Citizens Bank, as Trustee, ever accepted an assignment or transfer of any interest in the property by the Trustor, Farm Home Builders?

Mr. Von Herzen: I object to that as incompetent, irrelevant and immaterial. There is a further objection to that: Citizens Bank is not a party here, and it is immaterial.

The Commissioner: Objection overruled.

Mr. North: Will you read the question, Mr. Reporter? [167]

(Question read by the Reporter.)

A. No. [168]

* * * * *

FRANK D. HALL,

one of the Debtors, having been heretofore duly sworn, testified as follows:

Cross Examination [209]

* * * * *

Q. By Mr. North: Then it was in 1940 that the place was first plastered with foreclosure signs?

A. I tell you I don't know for sure, whether it was early in '40 or late in '39.

(Testimony of Frank D. Hall)

Q. And that was the reason why you ceased your farming?

A. I did not say that. I said I did not pay any attention to remembering anything I did there after that.

Q. Then you have no recollection of anything that you did there after that, 1939?

Mr. Von Herzen: He didn't testify to that. I object [214] it as assuming a fact not in evidence.

The Commissioner: Overruled.

A. Outside of taking care of the poultry, and stuff like that we had there. we did not do any planting, if that is what you mean. [215]

* * * * *

Q. There is a cultivator and a planter, and what else?

A. There are two or three harrows, I am quite sure, and a plow.

Q. Do you know when any of those were last used?

A. Well, the harrows were used by my son. I don't know how long ago.

Q. Some years ago?

A. No so very long. He has used them on his different farming around.

Q. On his different farming around? A. Yes.

Q. When did you last use any of them?

A. I might have used some of them when I was working on these berries.

Q. In 1937 and '38? A. Yes.

Q. That's the last time? A. Yes. [223]

* * * * *

(Testimony of Frank D. Hall)

Q. During the last three years how much of your time have you spent in either dairy farming or the tilling of the soil or the raising of poultry and livestock on that property? A. The last three years?

Q. Yes. A. Since you foreclosed on it?

Q. Yes. A. I haven't spent any.

Q. When did you last spend any time in dairy farming, [226] ing, or the tilling of the soil, or raising poultry or livestock on that property?

A. I think I just testified there was poultry raised there until 1940.

The Commission: The question is when did you spend any time doing it.

Mr. Von Herzen: That wasn't the question, Your Honor.

Mr. North: Yes, it was.

(Discussion.)

The Commissioner: Have you got the question in mind?

A. I think so. It is a question I have answered many times.

The Commissioner: That may be so. Let us see if we can get a good answer now.

A. Not since 1939.

The Commissioner: Not since 1939? A. No.

Q. By Mr. North: Now, I believe that you testified that in 1940 you took \$1250.00 from this property; that is, \$600 in grazing privileges; \$150.00 in apples, and \$50 rental for bees, and \$450.00 hunting privileges, that is correct, is it not? A. Yes.

(Testimony of Frank D. Hall)

Q. You testified further that in 1941 you took \$1100 from the property: \$600 grazing privileges, \$50 bees, \$450 hunting; but no apples during the year 1941. [227]

A. I think that's the year that my wife and my son got the apple money.

Q. Your wife and your son? A. Yes.

Q. In 1941? A. Yes.

Q. Do you know how much those apples brought that year? Do you know of your own knowledge?

A. 1941?

Q. Yes. A. No, I don't.

Q. I believe you testified that in 1942 you took from the property \$808: \$400 grazing privileges, \$50 bees, \$58 apples and \$300 hunting privileges. That is correct, is it? A. Yes.

Q. You stated that you have had no other income from any other source, is that right?

A. Yes, I believe so.

Q. Do you know whether or not your wife has had any other income?

A. I guess she has had some, yes.

Q. She has? A. Yes, in small amounts. [228]

* * * * *

Q. I will ask you whether or not in February, 1941, in the Superior Court hearing, the question on page 200, was asked you—

Mr. Von Herzen: Let us give the reference, please. 200, line what?

Mr. North: Line 19. I will read you the portion I refer to, and ask you whether or not you did so testify?

(Testimony of Frank D. Hall)

“Q. Since 1929 you have lived on this property?

A. I would say that I lived off and on there a couple of years during that period at the first of it, but I did live down here for a while, because I could do [285] better work down here than up there.

Q. Well, you would say since 1937, for instance, you have lived on this property? A. Oh, yes.

Q. You have? A. Oh, yes, absolutely.

Q. Spent your time there?

A. No, I spent most of it running around.”

Mr. Von Herzen: Pardon me. That is incorrect.

Mr. North: What is incorrect?

Mr. Von Herzen: You read it to yourself. Did you get the error?

Mr. North: No.

“A. No, I spent my time, most of it, running around, trying to make sales and looking for prospects for sales. I couldn't sell anything up there, because people don't come up there to buy them. You have to go out and get them.

Q. And since 1937 you have spent the larger part of your time going out and getting purchasers for this property? A. Yes, sir.”

Did you so testify? A. Yes.

Q. Is that true as you testified then?

A. I should think it is. I didn't spend all of my time. I spent a great deal of time.

Q. From 1937 to 1941 you spent the larger part of your time going out and getting purchasers for this property, [286] is that correct?

A. 1941 is when you foreclosed.

(Testimony of Frank D. Hall)

Q. Mr. Hall, you testified in February, 1941?

A. Yes.

Q. And you said at that time:

“Q. And since 1937 you have spent the larger part of your time in going out and getting purchasers for this property? A. Yes, sir.”

Did you so testify?

A. That was your question. You asked me that question.

Q. The question is, did you so testify?

A. Yes, I testified to that.

Q. Was it true when you so testified?

A. With the exception of '41, I guess it was.

Q. During the last three years how have you spent the major portion of your time?

The Commissioner: 1940, 1941 and 1942, is that right?

Mr. North: Yes, Your Honor.

A. A great deal of it in court, and doing things relative to trying to get this obligation paid up.

Q. What did you do trying to get the obligation paid up?

A. I tried in a great many ways to get you paid up, Mr. North.

Q. I asked you, Mr. Hall, what you did in trying to [287] get the obligation paid up.

A. I tried to make sales; tried to borrow money.

Q. Then in 1940, 1941 and 1942 you spent your time in court and in trying to make sales and trying to get the obligation paid up, is that right?

A. Trying to make a sale.

(Testimony of Frank D. Hall)

Q. During those three years the major portion of your time has been used in that way?

A. 1940, 1941 and 1942?

Q. Yes. A. I think so. [288]

* * * * *

Cross Examination [293]

* * * * *

Q. [By the Commissioner]: Did you have cattle in 1927? That's the date the corporation was organized?

A. I may have had a few head.

Q. You had disposed of most of your cattle by that time? A. Yes, sir.

Q. You were living on the property, with your wife, at that time? A. Yes, sir.

Q. You disposed of most of your farming equipment at that time?

A. Well, I did; if I hadn't, I got rid of quite a lot of it when this deal was made with Phillips & Hambaugh. There was a \$5,000.00 tractor sitting in the yard, costing \$5,800.00. We were repairing it, when they went in there and took possession, and without asking my permission they dumped it in the ditch, with all its parts. That put us back quite a bit. [319]

Q. Did you finally sell it—what was left of it?

A. I finally sold it for junk.

Q. So, in 1927 the corporation was organized, still trying to pay off this indebtedness, and you disposed of most of your cattle, most of your farming equipment, and you were living on the property? A. Yes.

Q. Is that a fair statement? A. Yes. [320]

* * * * *

(Testimony of Frank D. Hall)

Redirect Examination

[326]

* * * * *

Mr. North: Petitioner's Exhibit 15, Your Honor,—
You and Mrs. Hall entered into this transfer to the corporation, Farm Home Builders, on the 9th day of April, 1927, and then in July you made this loan from the bank, that is, the Farm Home Builders made the loan from the Pan-American Bank of \$45,000.00, is that correct? A. I don't see the date.

Q. Down below. A. Yes.

Q. Then the Pan-American failed—what date was that, Mr. Robison?

Mr. Robison: July 11, 1929.

Q. By Mr. North: In the middle of 1929 the Pan-American Bank failed, and then the Pan-American Bank and the Farm Home Builders—

Mr. Von Herzen: Was Mr. Robison an officer then?

The Commissioner: That is immaterial, in my opinion, so far as the sequence is concerned.

Mr. North: Was that in 1929 that the Pan-American Bank failed?

Q. By Mr. North: On the first of September, 1927, the Farm Home Builders deeded to the Pan-American Bank, is [334] that correct?

A. I would think so. [335]

* * * * *

MARGUERITE S. HALL,

a witness called by and on behalf of the movant, having been first duly sworn, testified as follows:

Cross Examination

Q. By Mr. North: Mrs. Hall, you are the wife of Frank D. Hall, and one of the debtors here, is that right? A. Yes, sir.

Q. Where do you reside?

A. Where do I reside?

Q. Yes. A. North Hollywood, with my son.

Q. How long have you lived there?

A. Since about the latter part of 1940.

Q. Where did you live before that?

A. At Leona Valley.

Q. You lived in Leona Valley on the property we are talking about? A. On the property.

Q. You had lived there since when?

A. Since 1917. [336]

Q. Continuously?

A. Except those years when we were away, when Phillips and Hambaugh had the subdivision.

Q. That was about three years?

A. It has been stated. I believe two or three years.

Q. Do you know about when that was?

A. Yes, '27.

Q. About 1927? A. Yes.

Q. Has Mr. Hall lived on this property since 1940?

A. I beg your pardon

Q. Has Mr. Hall lived on the property since 1940?

A. Since 1940?

(Testimony of Marguerite S. Hall)

Q. Yes.

A. Back and forth. He has been looking after the property.

Q. Where has he resided since 1940?

A. With my son in North Hollywood.

Q. Do you know when he changed his place of residence? A. When he came down there?

Q. Yes. A. Yes, sir.

Q. When

A. About the latter part of 1940, when I did. [337]

* * * * * * * *

FRANK D. HALL,

recalled, for further examination. [455]

* * * * * * * *

Q. [By Mr. Hughes]: There are some contracts the Bank is still collecting on which are good, and which they should pay off. Mr. Hall says they are between two and three thousand dollars.

A. I am not sure. I think it would be about that.
(Discussion off the record.)

This matter was here continued until February 26, 1943.

(The proceedings of February 26, 1943, and August 12 and 13, 1943, consisted of argument and discussion, no testimony being taken.) [458]

Los Angeles, California, Monday, September 27, 1943;
10 A. M.

The Commissioner: I notice that the bank's representative is here. Mr. Von Herzen, I have a full photostatic copy of this instrument, complete, and I would like to return this original.

Mr. Von Herzen: No objection, Your Honor.

The Commissioner: Now, gentlemen, the last time we met in this case we were in the midst of determining the amount of the debt on this claim which was filed by the Citizens National Trust & Savings Bank and approved by the Pacific States Corporation. In the interim there has been filed a petition to dismiss, which was filed by the Citizens National Bank as trustee, I believe.

Mr. Von Herzen: May the record show, Your Honor, that I have served objections upon counsel, and am offering now my objections to the petition for dismissal, motion to strike, motion to dismiss, filed by the Citizens National Trust & Savings Bank. And I have prepared my objections in writing, and since the preparation of those objections certain additional objections have come to mind that I will have to make orally, but, not knowing whether or not we were going to have a reporter this morning, I deemed it expedient and proper to have the objections put in writing, so that a record may be before the Commissioner.

The Commissioner: In addition to the objections filed, [459] you are going to follow through with other written objections?

Mr. Von Herzen: Yes, Your Honor. My belief is, Your Honor, that maybe we can dispose of this matter on the objections filed, but, if that doesn't appear to be

the proper order of procedure to Your Honor, I would like to expand the objections to include an additional one which I would like to file. In my own mind, I am confident that the objections as filed are probably controlling, in any event, but if there is any question about it I would like to file an additional one.

The Commissioner: Well, I am looking at the petition.

Mr. North: Perhaps it would simplify the matter, Your Honor, if I withdraw the motion at this time to dismiss the petition for the application of funds, withdraw the motion to dismiss that petition, and let the petition stand, and I do that at this time.

Mr. Von Herzen: Your Honor, I don't believe Mr. North is in a position to make that request, unless he joins with the persons who now appear representing the Citizens National Trust & Savings Bank.

The Commissioner: We have two matters before us, as I announced. Now, you may proceed in this way: The petition for dismissal having been filed, and it being proper to file that petition at any time, it will have to be disposed of. If I would grant the petition, naturally the hearing which we have been conducting on the amount of the debt would fall; [460] I would see no reason for going on with it. On the other hand, if I deny the petition, it will continue. However, I will want to hear what the petitioner's point is, and also listen to your objections, and possibly will take that matter under advisement. I don't think you will have a great deal more, will you, Mr. Sondel, in your argument? You were about ready, I think, to turn it over to Mr. North.

Mr. Sondel: In fact it has been turned over.

The Commissioner: And then it will come back to you for rebuttal.

Mr. Sondel: Yes.

The Commissioner: I think, in order to save time, we had better go right ahead upon the petition.

Mr. Von Herzen: Here is a copy.

Mr. Cusack: I think I have a copy.

The Commissioner: I carefully put everything away. Will this handicap you?

Mr. Cusack: I would still have my yellow copy.

The Commissioner: Very well. I will return this to you when I return the others.

Mr. Cusack: We have three matters, if Your Honor please. The first is a petition to dismiss the proceeding on the ground that the debtors are not the owners of the real property described in the petition.

Second, a motion to dismiss, upon the ground that the debtors or either of them are not farmers within the meaning [461] of the Act. And, third, a motion to strike from the petition and schedules the description of the real property of which the bank is the owner.

The Commissioner: Now, having heard your petition to dismiss the proceedings on the ground that the debtor is not a farmer, do you consider that that petition would be in order?

Mr. Cusack: It goes to the jurisdiction of the court, and we have several authorities to the effect that that matter may be raised at any time.

As far as the facts are concerned, I assume that the evidence will be the same, but we are making it for and on behalf of a party who was not a party to the other proceeding, and it goes to the question of jurisdiction, and it seems to me it could be raised at any time.

The Commissioner: In other words, you are raising it as a proposition of law.

Mr. Cusack: I am perfectly *will* to submit it on the testimony taken by the other side and on the affidavit which we filed, and then we can present our authorities in the matter and present counsel a copy, and then we can proceed on the petition to dismiss on the ground that they are not the owners of the real property.

The Commissioner: Well, let us proceed, and I will determine whether I will rule that that is out of order at this time. I don't want to shut you off, so you go right ahead. [462]

Mr. Cusack: I think we should start, then, on the petition to dismiss upon the ground that the debtors are not the owners of the real property.

The Commissioner: Very well.

Mr. Cusack: There has been no answer to the petition filed, and I assume it will be stipulated that paragraph 1 of the petition is true, that "Petitioner is a National Banking Association organized and existing under the laws of the United States of America and having its principal place of business in the City and County of Los Angeles, State of California."

Mr. Von Herzen: If we are going to engage in any stipulations, I would like to have a stipulation that Mr. Cusack and his firm are engaged in this matter by the Pacific States Corporation, and not the Citizens National Savings Bank, and arrangements are made with the Pacific States Corporation, and not the Citizens National Trust & Savings Bank. I understand counsel is willing to so stipulate, the materiality of it, however, to be determined by the court.

Mr. Cusack: We are not willing to represent that we are representing the Pacific States Corporation. We are representing the Citizens National Trust & Savings Bank

of Los Angeles. I think there is an arrangement between the Citizens National Trust & Savings Bank and some other party—I don't know whether it is the Pacific States Corporation or who it is—that any expenses incurred will not be borne by [463] the Citizens National Trust & Savings Bank.

The Commissioner: Gentlemen, that is all immaterial. You are here representing a party, and if the party is a proper party, that is satisfactory. What arrangements clients have has nothing to do with it at this time. Go ahead and proceed to get your stipulations in regard to the original facts as to corporate capacity. Is there any question about the corporate facts?

Mr. Von Herzen: I don't want to have Your Honor pre-judge the matter, but I would like to have that stipulation along with the others. In bankruptcy matters, the question of who the attorneys appearing before the referee represent is not only a material matter, but is very frequently determinative of interest, and is so acknowledged, and habitually, you might say, a matter of inquiry in ordinary bankruptcy. I don't want Your Honor to feel that I am insisting upon this when Your Honor does not want to hear it, but I don't want Your Honor to pre-judge the matter, because I think it will be shown that it is material. I don't want Your Honor to fix in your mind that it is immaterial at this moment or any other time in this proceeding.

The Commissioner: I suppose you will be having something to say about that later on, but at the present time I have counsel appearing before me on behalf of a party whose name is on a creditor's claim, and counsel has a right to appear. Now, what arrangement there may be between that counsel [464] and other counsel is some-

thing that we can discuss later on, if you think there is some arrangement between the Pacific States Corporation and the Citizens National Trust & Savings Bank.

Mr. Von Herzen: Of course, the situation is this, Your Honor, that, assuming the facts that I have suggested be stipulated to are correct, and assuming further the additional fact that the Citizens National Trust & Savings Bank does not claim the property for itself or the profits thereof for itself, coupled with the fact that the vice-president of the Citizens National Bank appeared in this matter as a witness, and that representatives of the bank have been present at the hearings at all times, if those facts be true and may be stipulated to, we are actually wasting a great deal of time, because the matter is completely determined then and we don't have to proceed further. I feel just like Your Honor. I want counsel to have his full day in court, and so forth and so on, but the matter having been presented by the real party in interest, it being an adversary proceeding, and not a default, and it having been completely gone into in detail over the period of weeks and months, with representatives of the Citizens National Bank as witnesses and as observers in the courtroom during all of that time—I don't want to go too far in what I say about it, and will restrain myself, but at the same time it appears that the very thing that probably we may have mentioned at the time, that counsel for [465] the third party in interest wanted me to waive the findings of fact is what has occurred here now. Possibly my consenting to the waiver of those findings of fact is the reason that they have seen fit to file this petition today. I feel as if I have been taken advantage of, frankly. [466]

Los Angeles, California, Monday, October 4, 1943;
10 A. M.

The Commissioner: Are you ready to proceed?

Mr. North: Yes.

The Commissioner: We are back now on the hearing on the matter of interest. I am somewhat handicapped because my notebook that contains all my notes is at my office.

(Discussion.)

Mr. North: I will ask Mr. Horstmann to take the stand. [517]

* * * * *

Afternoon session; 2:00 o'clock.

The Commissioner: Gentlemen, I want to make a statement in regard to the exhibits so there will be no confusion.

This morning there were introduced in evidence four letters. We put them in as one exhibit. They will be known as Debtor's Exhibit 2-10.

At this point in the record I point out that this is a continuation of the hearing which started on August 12, 1943, and in between there was a hearing on the petition of the Citizens National Trust & Savings Bank, as Trustee, which hearing started on September 27, 1943. As I recall, it ended the same day, did it not?

Mr. Von Herzen: It ended the same day, Your Honor.

The Commissioner: Each one of these exhibits as filed bears the number of the case and the party whose exhibit it is, the exhibit number and the date that it was filed, together with my name as the Commissioner.

So by looking at the date of the filing of the exhibit that will correspond with the date of the hearing, and we will know which hearing it was. [532]

* * * * *

Los Angeles, California, Tuesday, October 5, 1943;
10:00 A. M.

The Commissioner: Gentlemen, are you ready to proceed in this matter?

(Discussion.)

Mr. Sondel: I presume Mr. Horstmann has the original records of the bank that Mr. MacFarlane had yesterday. [568]

* * * * *

Los Angeles, California, October 14, 1943; 10:00
o'clock A. M.

Appearances:

C. P. Von Herzen, Esq., and David A. Sondel, Esq.,
for Debtor.

Derthick, Cusack & Ganahl, by William J. Cusack, Esq.,
for Citizens National Trust & Savings Bank, Trustee.

Richard L. North, Esq., for Pacific States Corporation.

Mr. North: Mr. Cramer is here and he is anxious to get away, and I will ask that we put him on now and ask him the necessary questions.

The Commissioner: Very well. Have you been sworn, Mr. Cramer?

Mr. Cramer: No, Your Honor.

* * * * *

[Endorsed]: Filed Jun. 18, 1946. [631]

[PETITIONERS' EXHIBIT NO. 1]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 457525

Action brought in the Superior Court of the County of
Los Angeles, and Complaint filed in the Office of the
Clerk of the Superior Court of said County.

Frank D. Hall, Marguerite S. Hall, and Farm Home
Builders, Incorporated, a corporation, Plaintiffs, vs. Citizens
National Trust & Savings Bank of Los Angeles, a
national banking association, Title Insurance and Trust
Company, a California corporation, Pacific States Corporation,
a California corporation, John Doe I, John Doe II,
Mary Doe I, Mary Doe II, John Doe Corporation,
a California corporation, Defendants.

SUMMONS

The People of the State of California Send Greetings to:
Citizens National Trust & Savings Bank of Los
Angeles, a national banking association, Title Insurance
and Trust Company, a California corporation,
Pacific States Corporation, a California corporation,
John Doe I, John Doe II, Mary Doe I, Mary Doe II,
and John Doe Corporation, a California corporation,
Defendants.

You are directed to appear in an action brought against
you by the above named plaintiff..... in the Superior Court
of the State of California, in and for the County of Los
Angeles, and to answer the complaint therein within the
days after the service on you of this Summons, if served
within the County of Los Angeles, or within thirty days

(Petitioners' Exhibit No. 1)

if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff..... will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, thisday of Nov. 4 - 1940, 1940.

(Seal of Superior Court
Los Angeles County)

L. E. LAMPTON,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By M. F. GIFT

Deputy.

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk.

* * * * *

(Petitioners' Exhibit No. 1)

In the Superior Court of the State of California
in and for the County of Los Angeles

No.

Frank D. Hall, Marguerite S. Hall, and Farm Home Builders, Incorporated, a corporation, Plaintiffs, vs. Citizens National Trust & Savings Bank of Los Angeles, a national banking association, Title Insurance and Trust Company, a California corporation, Pacific States Corporation, a California corporation, John Doe I, John Doe II, Mary Doe I, Mary Doe II, John Doe Corporation, a California corporation, Defendants.

COMPLAINT TO ENJOIN SALE OF REAL PROPERTY; FOR REFORMATION OF INSTRUMENTS; FOR DECLARATORY RELIEF; FOR ACCOUNTING; ETC.

Now come the plaintiffs, and for their complaint against the defendants allege:

FIRST CAUSE OF ACTION

I.

Plaintiffs, Frank D. Hall and Marguerite S. Hall, now are, and at all of the times hereinafter alleged were, husband and wife; that prior to the incorporation of plaintiff, Farm Home Builders, Incorporated, under the laws of the State of California on January 13th, 1927, said Frank D. Hall and Marguerite S. Hall were the owners of the real property situated in Los Angeles County, California, and described in that one certain Deed of Trust referred to in Paragraph II hereof; that

(Petitioners' Exhibit No. 1)

said Frank D. Hall and Marguerite S. Hall had caused said Farm House Builders, Incorporated, to be organized for the purpose of taking and holding title to said real property, and that upon the incorporation of said plaintiff corporation, said Frank D. Hall and Marguerite S. Hall transferred and conveyed all of said real property to said plaintiff corporation in exchange for shares of the capital stock of said corporation; that thereafter, the Corporation Commissioner of the State of California cancelled the permit authorizing the transfer of said capital stock and thereupon, in order to restore and re-vest title in and to said real property in said Frank D. Hall and Marguerite S. Hall, said plaintiff corporation, on or about December 12, 1932, by an instrument in writing, transferred and assigned said real property and all of its beneficial interests therein and all of its right, title and interest thereto to plaintiffs, Frank D. Hall and Marguerite S. Hall, and that said Frank D. Hall and Marguerite S. Hall ever since have been, and now are, the owners of said real property and the beneficial interests therein, excepting only as is hereinafter set forth.

That defendant, Citizens National Trust & Savings Bank of Los Angeles, hereinafter called Citizens Bank, is a national banking association, with its principal office at Los Angeles, California; that defendant, Title Insurance and Trust Company, hereinafter called Title Company, is a corporation organized under the laws of the State of California, with its principal office at Los Angeles, California; that defendant, Pacific States Corporation, is a corporation organized under the laws of

(Petitioners' Exhibit No. 1)

the State of California, with its principal place of business at Los Angeles, California.

That defendant, John Doe Corporation, is a corporation organized under the laws of the State of California, with its principal office at Los Angeles, California; and that the correct names of John Doe I, John Doe II, Mary Doe I, and John Doe Corporation, are unknown at this time to the plaintiffs, and that upon ascertainment of the correct names of such defendants, application will be made by plaintiffs to amend this complaint accordingly.

II.

On July 30th, 1927 at Los Angeles, California, the plaintiff corporation executed and delivered to Pan American Bank of California, a banking corporation, at Los Angeles, its promissory note in the sum of \$45,000.00, a copy of which is attached hereto as Exhibit "A" and made a part hereof; that concurrently therewith, plaintiff corporation executed and delivered to said Pan American Bank its Deed of Trust dated July 30th, 1927 to secure the payment of said promissory note, a copy of which Deed of Trust is attached hereto as Exhibit "B" and made a part hereof; that plaintiff corporation is named the Trustor and defendant Title Company is named Trustee and Pan American Bank of California is named Beneficiary in said Deed of Trust; and that said Deed of Trust was recorded on August 20, 1927 in the office of the County Recorder of Los Angeles County, in Book 7684, at Page 131, Official Records, Los Angeles County, California.

(Petitioners' Exhibit No. 1)

III.

That defendant, Title Company, named as Trustee in the Deed of Trust, referred to as Exhibit "B" hereof, has at no time resigned or withdrawn as Trustee and now is the sole and acting Trustee of said Deed of Trust; and that said Deed of Trust has never been released or discharged, excepting only as to forty-eight separate parcels or portions of the real property therein.

IV.

That concurrently with the execution of said note and Deed of Trust, referred to in Paragraph II, the plaintiff corporation and Pan American Bank of California executed a Declaration of Trust wherein the Pan American Bank was named as Trustee and Beneficiary of the same real property described in the Deed of Trust securing the aforesaid promissory note; that the express purpose of said Declaration of Trust was to subdivide, improve and sell the real property described in said Deed of Trust (and being the same property described in said Declaration of Trust), in order to obtain sufficient funds with which to pay said promissory note out of the proceeds of such sales, and the residue and balance thereof to be delivered and transferred to the plaintiff corporation or its successors and assigns; that said Declaration of Trust contained provisions for releases of portions of said real property according to a schedule therein set forth and that said Deed of Trust contained a provision that it was subject to the provisions for the release of portions of said property as per a schedule contained in the said Declaration of Trust.

(Petitioners' Exhibit No. 1)

V.

That at all times during which plaintiff corporation was actually engaged in business, plaintiff Frank D. Hall was the President and Managing Agent thereof, and during all periods of time when said plaintiff corporation was inactive, and after the conveyance of said real property by plaintiff corporation to plaintiffs, Frank D. Hall and Marguerite S. Hall, plaintiff Frank D. Hall had complete charge, supervision and control over the sales of said real property.

That between the date of the execution of said note and Trust Deed and the 2nd day of December, 1929, numerous parcels of said real property were sold under contract and in fee simple, and in numerous instances releases of such parcels of real property were executed by defendants, Title Company and Citizens Bank, releasing and discharging said parcels of real property from said Deed of Trust and from said Declaration of Trust.

VI.

That prior to December 2, 1929, Pan American Bank of California became unable to perform its duties under the Declaration of Trust of July 30th, 1927, by reason of the fact that it had been taken over by the Superintendent of Banks of California for liquidation; that on December 2nd, 1929, a Declaration of Trust, bearing No. 5873 was executed between the plaintiff corporation as Trustor and Beneficiary, defendant Citizens Bank as Trustee, and Pan American Bank as First Payee, a copy of which Declaration of Trust is attached hereto as Exhibit "C" and made a part hereof.

(Petitioners' Exhibit No. 1)

VII.

That said Declaration of Trust No. 5873, among other things, recites:

(a) "Whereas, the Trustor has caused to be conveyed to the Trustee that certain real property, situate in the County of Los Angeles, State of California, and more particularly described in Exhibit "A", attached hereto and mad a part of this Declaration of Trust".

That said allegations were and are false and untrue, in that at said time, or at any time prior thereto, the Trustor had not caused any real property to be conveyed to the Trustee, and that said Trustor had at no time conveyed any real property to the Trustee; and that Exhibit "A" attached to said Declaration of Trust does not contain any description of any real property with sufficient particularity or clarity to enable any real property to be identified or located in any respect whatsoever.

(b) "The Farm Home Builders, Incorporated, are indebted to the Pan American Bank of California, as evidenced by one certain promissory note."

That said recital was and is false and untrue in that on and prior to December 2nd, 1929, the indebtedness of said plaintiff corporation to the Pan American Bank of California was much less than the sum of \$45,000.00, the face or principal amount of said note, many and numerous payments of principal having been made in reduction of the principal sum of said note, the exact amounts of which are unknown to the plaintiffs, but are within the knowledge of the defendants, and each of them.

(Petitioners' Exhibit No. 1)

(c) "The Trustee hereby certifies and declares that it holds and will hold such title to the Trust property hereinbefore described, as has actually been conveyed to it in Trust."

That such recital is false and untrue in that no real property of any kind had on or prior to December 2nd, 1929 been transferred or conveyed to the defendant, Citizens National Trust & Savings Bank of Los Angeles, as Trustee, by plaintiff corporation or by Pan American Bank of California.

(d) "This Trust shall continue to and until the sale and/or disposition in fee of all the property subject to this Trust and the distribution of all proceeds thereof, in accordance with the terms hereof, or until terminated by written direction to the Trustee, signed by all parties in interest, or until the date of the death of the last to die of the following named persons: Edmond B. Tracy, Ann Louise Tracy, and Carmen Lillian Gould, whichever event shall happen first."

That none of said events has occurred or happened.

VII.

That on or about January 7th, 1930, the Pan American Bank and M. M. Ewing, as Special Deputy Superintendent of Banks of the State of California in charge of the liquidation of the said Pan American Bank of California, executed a Grant Deed to defendant Citizens Bank, which was recorded in the office of the Recorder of Los Angeles County, on January 17th, 1930, in Book 9691, at page 133, Official Records, describing certain portions of the real property described in the Deed of Trust hereinbefore

(Petitioners' Exhibit No. 1)

referred to as Exhibit "B" hereof, and plaintiffs allege that it was the express plan, purpose and intention of said Pan American Bank, and the Superintendent of Banks of the State of California in charge of the liquidation of said Pan American Bank, to transfer to said Citizens Bank as Trustee whatever right, title and interest said Pan American Bank, and the Superintendent of Banks, had in the portions of the real property described in said Grant Deed, in order that said Citizens Bank as Trustee under Declaration of Trust No. 5873 could perform its duties therein; and that from time to time after January 7th, 1930 numerous and divers lots and parcels of real property described in Deed of Trust (Exhibit "B"), and likewise described in said Grant Deed, were sold, and contracts therefor were issued, and deeds were delivered, and releases were executed, and payments for said lots and said contracts were made, and the cash received from such sales and contracts were applied by the defendants, Title Company and Citizens Bank, to the reduction of the principal of said note and in payment of the interest of said note; and that the plaintiffs do not know the exact or respective amounts and dates of payments and applications of principal and interest, and the times and manner and amounts of reductions of said principal sum and interest, but allege that all of said information is within the express knowledge of the defendants, and each of them.

IX.

That upon the execution and delivery of the Declaration of Trust No. 5873, it was the mutual plan, purpose, intention and policy of all of the parties thereto and of

(Petitioners' Exhibit No. 1)

the defendant, Title Company, that the time of the payment of the unpaid principal sum of the promissory note, Exhibit "A", and the interest thereon, should be suspended, extended and continued until such time and times as payments thereon could be made from the proceeds to be derived from the sales of parcels of the real property described in the Deed of Trust, Exhibit "B", and that the maturity date of said promissory note should and would be accordingly considered, deemed and regarded as modified, amended, extended and reformed, in order to carry out and effectuate the aforesaid mutual plan, purpose, intention and policy of all of said parties; that thereafter, various and numerous payments were made to and applied by said defendants, Title Company and Citizens Bank, from the proceeds of sales of parcels of said real property and that upon each and all of said occasions said Title Company and Citizens Bank made application either in reduction of the principal sum of said note or in payment of interest, all in their own discretion, and all of such sums of money were derived exclusively from the sales of parcels of said real property; that such practice, understanding, arrangement, agreement and custom continued uninterruptedly from the 7th day of January, 1930 to on or about June 1st, 1940, notwithstanding the fact that said note, according to the tenor thereof, matured on July 30th, 1932; that at no time prior to on or about June 1st, 1940 did the defendants, Title Company or Citizens Bank or Pan American Bank or the Pacific States Corporation, or any other person claiming to be the assignee of said Pan American Bank, or any of them, claim, assert, declare or allege that the unpaid principal

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sum of said note, or any unpaid interest thereon, had matured or become due on July 30th, 1932, but on the contrary, from and after July 30th, 1932, and continuously up to on or about November 1st, 1939, defendants, Title Company and Citizens Bank, and the Pan American Bank in liquidation, and thereafter to on or about June 1st, 1940, said defendants, Title Company and Citizens Bank, continued to receive payments derived from the proceeds of the sales of real property and to apply the same in the reduction of the principal sum of said note and the payment of interest thereon the same manner and according to the same practice which had been adopted and used by the Citizens Bank and Title Company, and each of them, prior to July 30th, 1932, and said Title Company and Citizens Bank and the plaintiffs continued to operate under the respective Trusts (Deed of Trust dated July 30th, 1927 and Trust No. 5873) after July 30th, 1932 in the same general manner as prior thereto.

X.

Pursuant to the mutual plan, purpose, program, intention and policy described in Paragraph IX hereof, and in recognition and acknowledgment of the fact that the maturity of said note had been extended and suspended as hereinbefore set forth, the defendant, Citizens Bank and plaintiff corporation, for and in behalf of plaintiffs, Frank D. Hall and Marguerite S. Hall, and Pan American Bank in liquidation, on or about October 28th, 1935 entered into a written Amendment to Declaration of Trust No. 5873, a copy of which is attached hereto as

(Petitioners' Exhibit No. 1)

Exhibit "D" and made a part hereof, the primary purpose of which was to change the schedule of minimum selling and release prices, all for the express purpose, plan and intention that said plaintiffs should continue after October 28th, 1935 to sell parcels of real property described in the Deed of Trust, Exhibit "B", and to have the proceeds derived therefrom applied by the Citizens Bank and the Title Company in payment of the principal sum and interest on the promissory note, and that upon and after the execution of said Amendment of October 28th, 1935, all of the parties thereto and plaintiffs, Frank D. Hall and Marguerite S. Hall, acted thereunder and in pursuance thereof, and that except for the change in the schedule of minimum selling and release prices, each and all of said parties continued to operate under said Declaration of Trust No. 5873 in the same manner as they had operated prior to uly 30th, 1932.

XI.

That on or about February 9th, 1939, a second amendment to said Declaration of Trust No. 5873 was made and entered into between Citizens Bank, the plaintiff corporation, plaintiffs Frank D. Hall and Marguerite S. Hall, and Pan American Bank in liquidation, a copy of which is attached hereto as Exhibit "E" and made a part hereof; that the primary purpose of said Second Amendment was to again amend and modify the release prices of the property then remaining in said Trusts, in order facilitate the sale thereof, and that said amendment so expressly provided in the following words: "Whereas,

(Petitioners' Exhibit No. 1)

it is now desired to again amend and modify the release prices of the property now remaining in said Trusts in order to facilitate the sale thereof"; that it was then the continuing mutual plan, purpose, intention, program and policy of the parties to said amendment and the Title Company that the plaintiffs, Frank D. Hall and Marguerite S. Hall, should continue to sell and dispose of the real property described in said Deed of Trust and that from the proceeds derived from such sales, payments should be made on said note in reduction of the principal sum and in payment of interest; and that except only for the change in the schedule of such release prices, the parties thereto, and the Title Company, were to and should continue to act and perform their respective duties and functions under said Declaration of Trust in the same manner and for the same purpose as prior to July 30th, 1932, and that when each of said amendments was adopted, agreed to and executed, it was the mutual plan, purpose, intention, program and policy of all of the parties thereto and of the Title Company that notwithstanding the maturity date set forth in the promissory note, the time of payment of such promissory note should be suspended, extended and continued until such time and times as payment thereon could be made from the proceeds of sales of parcels of real property according to the respective minimum selling prices and release prices set forth from time to time, until the sale of sufficient parcels of real property should be made to realize enough funds with which to pay said note; and that such mutual understanding continued uninterruptedly until on or about June 1st, 1940.

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XII.

That on or about November 2nd, 1939, the Pan American Bank, then in liquidation, executed and delivered two separate documents through the Superintendent of Banks, one designated "Assignment of Beneficial Interest", and the other designated "Assignment of First Payee's Interest", a copy of each of which is attached hereto as Exhibits "F" and "G" respectively, wherein and whereby said Pan American Bank in liquidation, through the Superintendent of Banks, purported and pretended to transfer to defendant, Pacific States Corporation, the right, title and interest of said Pan American Bank as set forth in said instruments; that said Pacific States Corporation did not at any time purchase said assets from said bank in liquidation; that said bank in liquidation did not at any time sell said assets to said Pacific States Corporation; that said Pacific States Corporation professed to hold and have a chose in action against the Pan American Bank in liquidation, and said assignments were delivered by the Superintendent of Banks to Pacific States Corporation in an attempt to compromise such claim or chose in action; that said transfers, and each of them, were made in violation of and contrary to law in that the Pan American Bank in liquidation was not empowered or authorized by law, as is provided by Section 136 of the Bank Act, or otherwise, and the Superintendent of Banks, and the Deputies or Special Deputies of the Superintendent of Banks, were not authorized or empowered by law to make any such transfer or assignment in the manner or for the purposes in this paragraph set forth; and that at no time was

(Petitioners' Exhibit No. 1)

the promissory note or the Deed of Trust, dated July 30th, 1927, transferred, sold or assigned to Pacific States Corporation, and that said Pacific States Corporation at no time acquired title or ownership thereof, and is not now the owner or holder thereof or of any interest or equity therein.

XIII.

That on or about June 7th, 1940, defendant Citizens Bank transmitted by mail to plaintiff, Frank D. Hall, a letter in words as follows:

"June 7, 1940 Trust 5873

Mr. F. D. Hall
Leona Valley Via
Palmdale, California

Dear Mr. Hall:

This is to advise that the other day we received a notice from the Pacific States Corporation of certain events of default heretofore occurring on the former Pan American Bank obligation now held by them and requesting us, as Trustee under our above Trust, to declare all obligations due them, as Payee under said Trust, together with interest thereon, immediately due and payable and forthwith proceed to a foreclosure under the Declaration of Trust. We were also requested to make demand upon you for the payment to us, as Trustee, of all funds received by you from renting portions of the Trust property for pasturage, crops, and shooting rights.

(Petitioners' Exhibit No. 1)

Accordingly, demand is herewith made upon you for the payment immediately to us of all amounts due under the Trust Deed obligation, with interest thereon as therein provided, and for all rentals received by you as above stated, and you are further advised that we are proceeding to prepare a Notice of Beach and Deault under said Declaration of Trust in accordance with the request of said Pacific States Corporation, as Payee under our above numbered Trust.

Very truly yours,

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES

By Carl P. Smith

HC DA

Vice President and Trust Officer"

That at said time Pacific States Corporation had no authority to make or issue any orders or directions or instructions to said Citizens Bank respecting the real property or Deed of Trust or Declaration of Trust hereinbefore referred to; that at such time Pacific States Corporation had no authority to declare any defaults of any kind due and that at such time there were no defaults of any kind in respect to said Declaration of Trust or said Deed of Trust, and that at such time, and at all times prior thereto, defendant Citizens Bank well knew that there was no default of any kind under said Deed of Trust, or under said Declaration of Trust, and that the transmittal by defendant Citizens Bank of such letter was in violation of and contrary to all of the mutual agreements, understanding and consents heretofore set forth respecting the suspension and extension of the

(Petitioners' Exhibit No. 1)

maturity date of the promissory note hereinabove referred to, and that all of such acts of said defendant Citizens Bank were done and made in bad faith and for the express purpose of depriving the plaintiffs of their right, title, interest and equity in and to the real property hereinbefore described, and in direct breach of the duties and obligations of said Citizens Bank as Trustee.

That on or about the 3rd day of July, 1940, defendant Citizens Bank filed for record in the office of the Recorder of Los Angeles County, California, a "Notice of Breach of Obligation and of Election to Sell Trust Property", a copy of which is attached hereto as Exhibit "H" and made a part hereof; that said Notice of Breach contains, among other things, the following recitals:

(1) "Whereas, the interest of said Pan American Bank of California, a Corporation, was subsequently acquired by the State Superintendent of Banks of the State of California in proceedd of liquidation of said Bank, and was by said Superintendent of Banks on November 2, 1939, duly assigned to Pacific States Corporation, a Corporation, said last named corporation being now the owner and holder of said note and Party of the Third Party's beneficial interest in and under said Declaration of Trust";

That the recital that the Pacific States Corporation is and was the holder and owner of said note was and is false, untrue and incorrect, as hereinbefore alleged, and that said Pacific States Corporation is not now and at no time has been the owner and holder of said note or of any beneficial interest in said Declaration of Trust;

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that at no time has any instrument been made, executed or delivered by any one or at all transferring or assigning to any one the Deed of Trust hereinbefore referred to as Exhibit "B", or the note securing the same, and that said note is now in the possession and under the exclusive control of the defendant, Title Company.

(2) "Whereas, said Declaration of Trust provides, among other things, that the Trustor caused to be conveyed to Trustee in trust with power of sale certain real property situate in the County of Los Angeles, State of California, the property so conveyed being described in that deed dated January 7, 1930, executed by the Pan American Bank of California, a Corporation, in favor of Citizens National Trust & Savings Bank of Los Angeles, recorded January 17, 1930, in Book 9691 at Page 133 of Official Records of said County, which property, except those portions thereof heretofore conveyed by said Trustee, by the deeds described in Exhibit A attached hereto, now forms the remaining corpus of said Trust";

That said recital is false, untrue and incorrect in respect to the property which now forms the remaining corpus of said Trust; that in many instances, certain parcels of real property have been sold to purchasers, but that such parcels have not yet been conveyed by any deeds and that such parcels of real property are subject to the rights of the purchasers under said outstanding agreements of sale.

(3) "Said Beneficiary covenants and agrees to deposit with Trustee all sums necessary for the payment of items

(Petitioners' Exhibit No. 1)

shown in Article III of said Declaration of Trust, said items including, among others, payment of taxes, assessments and other liens or encumbrances upon the trust property";

That said recital is false, untrue and incorrect in respect to the asserted claim that the Beneficiary is under all circumstances obliged and required to deposit money to pay taxes, assessments and other liens, and reference is made to said Declaration of Trust to demonstrate such falsity of said recital.

(4) "Whereas, default of said Trustor and/or Beneficiary, Farm Home Builders, a Corporation, under said Declaration of Trust, having heretofore occurred with respect to the following events:

1. Said Trustor and/or Beneficiary has failed and neglected to pay the remaining unpaid principal balance of said Trust Deed Note and obligation in the original sum of \$45,000.00, said remaining unpaid principal balance being in the sum of \$23,921.52, which matured and became due and payable on July 30, 1932;

2. Said Trustor and/or Beneficiary has also failed and neglected to pay the installment of interest on said Promissory Note and obligation which became due and payable on April 30, 1932, nor has any portion thereof since been paid, except the sum of \$363.85, which was applied on account of interest on August 23, 1937. No further payments of interest have been made on said obligation.

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3. Trustor and/or Beneficiary has also failed and neglected to pay the regular installments of general and special State and County taxes on the property covered by said Declaration of Trust subsequent to 1931-32, save and except a payment of \$436.56 paid by said Trustee on September 27, 1938, and also a payment of \$278.97 paid by said Trustee on March 20, 1939.

4. Said Trustor and/or Beneficiary has also failed and neglected to proceed with all due diligence to sell the unsold portion of the trust property, upon the terms and conditions provided in said Declaration of Trust, as therein provided."

That said recital is false, untrue and incorrect in respect to each and every one of the alleged events of default; that plaintiffs are informed and believe, and therefore allege, that the unpaid principal is less than \$23,921.52, but the exact amount is unknown to the plaintiffs, and such amount cannot be determined without an accounting, and an accounting cannot now be made by the plaintiffs, or any of them, because of lack of information from said Trustee as to the facts and application of funds received by said Trustee; and that plaintiffs allege that none of the unpaid principal sum is past due or in default; plaintiffs further allege that the defendant Citizens Bank has continuously refused to give to plaintiffs, or any of them, an accounting of the trust receipts applicable to the payment of interest, or of the manner of application of any funds for the payment of interest, and plaintiffs are informed and believe, and therefore allege, that if correctly applied, the receipts

(Petitioners' Exhibit No. 1)

applicable to the payment of interest were and are sufficient to satisfy in full all interest on the unpaid principle for a period far subsequent to April 30th, 1932; and plaintiffs further allege that if all interest has not been paid, the payment of interest was not and is not due, and is not now in default by reason of the mutual understanding and agreement of the parties as hereinbefore set forth; that plaintiffs allege that the Citizens Bank by and with the express consent and approval of all parties to the Declaration of Trust, Exhibit "C", has heretofore arranged for the payment of delinquent taxes under the ten year installment plan, and that this arrangement has been carried out and has been sufficient to in all respects protect the trust property, and that the Trustee has at all times concluded and deemed that such arrangement for the payment of taxes was sufficient for the protection of the trust property, and that the plaintiffs are not in default in any respect in the matter of the payment of taxes and assessments, and plaintiffs deny that they, or any of them, have in any manner failed or neglected to proceed with all due diligence to sell the unsold portions of the trust property, but on the contrary allege that the plaintiffs, and particularly plaintiff Frank D. Hall, have exercised due diligence in all respects and have faithfully attempted to sell the parcels of the unsold portion of said property, and further allege that the Citizens Bank has arbitrarily failed, neglected and refused to cooperate with said plaintiffs, or any of them, and has in many instances failed, neglected and refused to approve and carry out contracts and negotiations successfully concluded by the plaintiffs, and by their agents or representatives, for the sale of parcels of real property

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at prices in excess of the stipulated minimum prices and release prices, and that if said Trustee had accepted and approved said contracts, and had cooperated with the plaintiffs in the sale of such parcels, large and substantial sums of money would have been received by the Trustee in the performance of such contracts, so that said Trustee would have had additional funds and moneys with which to pay taxes, interest and principal.

XIV.

That said Notice of Breach of Obligation is further defective in that it does not contain a full and complete description of all of the trust property remaining in the Trust and over which it claims to have power to sell, and such omission refers not only to a description of the real property remaining in the trust, but also to a description of the real property covered by the agreements of sale and the present status of said agreements, all of which constitute a substantial portion of the trust assets.

That in said Notice of Breach, the Citizens Bank alleges its intention to sell the trust property "to the highest and best bidder for cash in gold coin of the United States"; and that since said payment in gold coin is prohibited by law, the sale of property on such terms is impossible.

XV.

That on the 17th day of October, 1940, and at numerous times thereafter, the defendant Citizens Bank caused to be published and posted a Notice of Trustee's Sale, a copy of which is attached hereto as Exhibit "I" wherein certain portions of the trust property described in the Deed

(Petitioners' Exhibit No. 1)

of Trust is set forth in said Notice of Trustee's Sale; that said Notice of Trustee's Sale contains all of the false, untrue and incorrect recitals heretofore referred to and set forth in the Notice of Breach of Obligation, and which are referred to in Paragraph XIII; and that in addition thereto, the said Notice of Sale does not contain a full and complete, or any description, of the real property described in the Agreements of Sale heretofore referred to, or of the status of said agreements, and that all of such information is required and is necessary to enable a valid sale to be made.

XVI.

That the Citizens Bank has ever since the 17th day of October, 1940, continuously threatened to sell the real property described in the Deed of Trust, Exhibit "B", and which was and is inadequately and improperly described in Exhibit "I", and unless restrained and prohibited by this Court, said defendant Citizens Bank will sell such property on the 13th day of November, 1940, at the hour of eleven o'clock A. M., at the eastern entrance of the Hall of Justice in the City of Los Angeles, County of Los Angeles, State of California.

XVII.

That no breach of any kind has in fact occurred at any time, or at all, and that none of the plaintiffs are in any default whatsoever respecting said note, Deed of Trust, or Declaration of Trust; that the Pacific States Corporation, prior to the execution of assignments, Exhibits "F" and "G", had inspected the files of the defendant Citizens Bank pertaining to said note, Deed of Trust, Declaration

(Petitioners' Exhibit No. 1)

of Trust, and amendments thereto, and all other matters pertaining to the operation of said Trust, and was at all times fully aware of the fact that the maturity date of said note had been extended as above set forth.

XVIII.

That no notice of any alleged breach of any of the obligations of the Deed of Trust has at any time been given by defendant Title Company; that at no time has defendant Title Company, as Trustee of the Deed of Trust, Exhibit "B", given any notice of any Trustee's sale; that the Notice of Trustee's Sale referred to as Exhibit "I" is not, and was not, given by, for or in behalf of defendant Title Company; that plaintiffs, and each of them, have at all times diligently, carefully and properly complied with each and all of the terms of said Declaration of Trust and of said Deed of Trust and of the two amendments, and have abided by the mutual agreements and undertaking as hereinbefore set forth; that there exists no excuse whatsoever for the recording of any Notice of Breach, and that there exists no basis whatsoever for the publication or posting of any notice of sale and that said proposed sale should not be had, and that plaintiffs have no adequate remedy at law; that plaintiffs, and each of them, will suffer and sustain irreparable injury and damage unless defendants' acts are, and the proposed sale is, restrained and prohibited by this Court.

(Petitioners' Exhibit No. 1)

XIX.

That the Doe defendants claim and assert a right, title and interest in and to said real property, the exact nature of which is not known to the plaintiffs, and that any and all of such claims are false and without right, and that said defendants are proper parties defendant.

SECOND CAUSE OF ACTION.

I.

Plaintiffs re-allege and incorporate herein by reference Paragraphs I to XVIII, both inclusive, of the First Cause of Action, with the same force and effect as if each and all of said paragraphs were herein set forth in haec verba.

II.

That said note, Exhibit "A", and said Trust Deed, Exhibit "B", and each of them, should now be modified, amended and reformed by deleting therefrom the maturity date as set forth therein, so as to make each of said documents conform with the mutual agreement and understanding of the parties hereto as hereinbefore set forth.

III.

That the Declaration of Trust No. 5873, and each of the amendments thereto, Exhibits "C", "D" and "E", respectively, should now be reformed by adding to each of them appropriate provisions thereto respecting the time and manner in which the promissory note shall be paid, all as is hereinbefore alleged and set forth.

(Petitioners' Exhibit No. 1)

THIRD CAUSE OF ACTION.

I.

Plaintiffs re-allege and incorporate herein by reference Paragraphs I to XVIII, both inclusive, of the First Cause of Action, with the same force and effect as if each and all of said paragraphs were herein set forth in haec verba.

II.

That a controversy exists among the parties hereto respecting the mutual rights, duties and obligations of all of said parties under, through, and by reason of all of the transactions hereinbefore set forth; that plaintiffs, and each of them, allege and maintain that said note is not due and is not in default; that plaintiffs allege that the Pacific States Corporation has no interest whatsoever in said note or in said Deed of Trust, or in said Declaration of Trust; that plaintiffs allege and maintain that they are not in default in any respect whatsoever; that defendants allege and maintain that Pacific States Corporation is the owner and holder of said note and is the beneficiary of said Deed of Trust and Declaration of Trust, and that the defendant Citizens Bank was and is under duty to follow the instructions of said Pacific States Corporation; that plaintiffs allege and maintain that Article III and Article IV, subparagraph 3, of said Declaration of Trust, are inconsistent with each other and require a judicial construction and determination in order that the rights of the parties hereto may be properly resolved; and that declaratory relief is hereby and herein sought to obtain a full and complete declaration of the rights of all parties to this controversy.

(Petitioners' Exhibit No. 1)

FOURTH CAUSE OF ACTION.

I.

Plaintiffs re-allege and incorporate herein by reference Paragraphs I to XVIII, both inclusive, of the First Cause of Action, with the same force and effect as if each and all of said paragraphs were herein set forth in haec verba.

II.

That a full, complete and accurate accounting is necessary in order to determine the correct amount unpaid on the note referred to, and in order to determine what amount of interest, if any, remains unpaid; that plaintiffs have made many and repeated demands for a full and complete accounting in all detail, of the trust receipts and trust expenditures, but that defendant Citizens Bank has failed, neglected and refused to make such detailed accounting to the plaintiffs, or any of them, and that such accounting is herein demanded through judicial decree.

Wherefore, plaintiffs pray this Court to grant and make an order, judgment and decree awarding them, and each of them, full relief by appropriate judgment, decree, process and writ, to wit:

(1) A prohibitory injunction restraining and enjoining defendants, and each of them, and particularly defendant Citizens National Trust & Savings Bank of Los Angeles, in any manner or form from holding or conducting a sale of any portion of the real property described in the Deed

(Petitioners' Exhibit No. 1)

of Trust or in the Declaration of Trust No. 5873, or in the Notice of Breach or in the Notice of Sale, or any portion of the real property described in the Complaint, reference to all of which is hereby made for further particulars and details, on November 13th, 1940, at eleven o'clock A. M., or at any other time, or at all, and in any event not prior to the trial and determination of this action;

(2) Adjudging and decreeing that plaintiffs, or any of them, are not in default in any respect whatsoever as alleged in the Notice of Breach or Notice of Sale referred to in the Complaint;

(3) Adjudging and decreeing that plaintiffs, and all of them, are entitled to the reformation of the documents and instruments as set forth in the Second Cause of Action;

(4) Adjudging and decreeing that plaintiffs, and all of them, are entitled to the declaratory relief as set forth in the Third Cause of Action;

(5) Adjudging and decreeing that plaintiffs, and all of them, are entitled to a full and complete accounting as set forth in the Fourth Cause of Action;

(6) For such other, further and additional relief as to the Court shall seem meet, equitable and proper; and

(7) For plaintiffs' costs and disbursements.

GOUDGE, ROBINSON & HUGHES
and DAVID A. SONDEL,

Attorneys for Plaintiffs.

(Petitioners' Exhibit No. 1)

EXHIBIT "A"

\$45,000.00 Los Angeles, California, July 30th, 1927
 . . . On or before five (5) years . . . after
 date, for value received, . . . promise to pay to
 . . . Pan American Bank of California, a Corporation,
 or order, at . . . Pan American Bank of California,
 Los Angeles, California . . . the sum of forty five thou-
 sand and no/100 (\$45,000.00).....dollars, with inter-
 est from . . . date . . . until paid, at the rate of
 seven per sent per annum, payable quarterly, in advance.

Should interest not be so paid it shall thereafter bear like interest as the principal. Should default be made in payment of interest when due, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due. Principal and interest payable in United States gold coin. If suit or action shall be instituted in any Court to collect any sum becoming due on this note, the undersigned promise to pay such sum as the Court may adjudge reasonable as attorney's fees in said suit or action. This note is secured by a Deed of Trust to Title Insurance and Trust Company, a corporation, of Los Angeles, California.

FARM HOME BUILDERS,
 INCORPORATED.

By F. D. Hall, President

By Erwin S. Hall, Secretary

(Seal)

(Petitioners' Exhibit No. 1)

(Endorsed)

For value received, I, we or either of us, jointly and severally, guarantee payment of this Note, with all costs, of collection and suit, including reasonable attorney's fees, also agreeing to pay reasonable attorney's fees incurred by the holder of this Note should suit be instituted or other proceedings be taken to enforce this guaranty, or if placed in hands of an attorney for collection. Presentment, protest, notice and demand of every kind being hereby waived. And we hereby consent to all extensions in the time of payment of said Note.

PHILLIPS AND HAMBAUGH
REALTY & CONSTRUCTION
CORPORATION.

By M. Penn Phillips, President

By R. Hambaugh, Secretary

F. D. Hall

M. S. Hall

EXHIBIT "B"

This Deed of Trust, made this 30th day of July, 1927, between Farm Home Builders, Incorporated, a Corporation, herein called Trustor, Title Insurance and Trust Company, a Corporation, of Los Angeles, California, herein called Trustee, and Pan American Bank of California, a Corporation, herein called Beneficiary,

Witnesseth: That Trustor hereby grants to Trustee, in trust, with power of sale, all that property in the County of Los Angeles, State of California, described as:

The West One Half of Lot One; Lots Two, Three, Four, Seven, Ten, Eleven and Thirteen; Lot Fourteen

(Petitioners' Exhibit No. 1)

and Lots Sixteen to Twenty-two, inclusive; and Lots Twenty-four to Twenty-nine, inclusive; all in Sheet No. One of Tract 5148, as per Map recorded in Book 56, Page 78, Map Records, Los Angeles County, California.

Lots Thirty-one to Thirty-four, inclusive; Lots Thirty-six and Thirty-nine to Forty-four, inclusive; Lots Forty-seven to Fifty-three inclusive; all in Sheet No. Two of Tract No. 5148, as per Map recorded in Book 61, Page 57 of Map Records, Los Angeles County, California.

Lot No. Fifty-four and Lots Fifty-six to Seventy-three, inclusive, all in Sheet No. Three of Tract No. 5148, as per Map recorded in Book 104, Page 77 Map Records, Los Angeles County, California.

Lots Seventy-four to Eighty-nine, inclusive, in Sheet No. Four of Tract 5148, as per Map recorded in Book 104, Page 78 of Map Records, Los Angeles County, California.

The Northwest Fourth of the Northwest Fourth of Section Thirteen (approximately 40 acres); The Southeast Fourth of Section Twelve (approximately 160 acres); The North Half of Section Twelve (approximately 320 acres); all of Section One (approximately 640 acres); The North East Fourth of Section Eleven (approximately 160 acres); The Southwest Fourth of the Southeast Fourth of Section Two (approximately 40 acres); and the Southwest Fourth of Section Two (approximately 160

(Petitioners' Exhibit No. 1)

acres); all in Township Six North (6-N), Range Fourteen West (14-W) San Bernardino Base and Meridian.

This conveyance is made subject to the provisions for release of portions of the above described property, as per schedule set forth in that certain Declaration of Trust executed on July 30th, 1927, between Farm Home Builders, Incorporated, Trustor, Pan American Bank of California, Trustee, et al.

For the purpose of securing:

First: Payment of the indebtedness evidenced by that certain promissory note (and any renewal or extension thereof) substantially in form as follows:

\$45,000.00, Los Angeles, California, July 30, 1927.

. . . On or before five (5) years . . . after date, for value received, . . . promise to pay to Pan American Bank of California, a Corporation . . . or order, at Pan American Bank of California, Los Angeles, California . . . the sum of forty-five thousand and no/100 (\$45,000.00) dollars, with interest from date until paid, at the rate of seven per cent per annum, payable quarterly, in advance.

Should interest not be so paid it shall thereafter bear like interest as the principal. Should default be made in payment of interest when due, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due. Principal and interest payable in United States gold coin. If suit or action shall be instituted in any Court to collect any sum becoming due on this note, the undersigned promise to pay such sum as the Court may adjudge reasonable as attorney's fees in said

(Petitioners' Exhibit No. 1)

suit or action. This note is secured by a Deed of Trust to Title Insurance and Trust Company, a corporation, of Los Angeles, California.

FARM HOME BUILDERS,
INCORPORATED

By F. D. Hall, President

By Erwin S. Hall, Secretary

(Corporate Seal)

Second: Payment and/or performance of every obligation, covenant, promise or agreement herein and/or in said note contained.

To have and to hold said property upon the following express Trusts, to-wit:

A. Trustor promises and agrees, during continuance of these Trusts:

1. For the purpose of protecting and preserving the security of this Deed of Trust: (a) to properly care for and keep said property in good condition; (b) not to remove or demolish any building thereon; (c) to complete in a good and workmanlike manner any building which may be constructed thereon, and to pay when due all claims for labor performed and materials furnished therefor; (d) to comply with all laws, ordinances and regulations requiring any alterations or improvements to be made thereon; (e) not to commit or permit any waste or deterioration thereof; (f) not to commit, suffer or permit any act to be done in or upon said property in violation of any law or ordinance; (g) to cultivate, irrigate, fertilize, fumigate, prune and/or do any other act or acts, all in a

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timely and proper manner, which, from the character or use of said property, may be reasonably necessary to protect and preserve said security, the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire insurance policy shall be credited first, to accrued interest; next, to expenditures hereunder and any remainder upon the principal, and interest shall thereupon cease upon the amount so credited upon principal; provided, however, that at option of Beneficiary, the entire amount so collected or any part thereof may be released to Trustor, without liability upon Trustee for such release.

3. To appear in and defend any action or proceeding purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the right, powers and duties of Trustees hereunder; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary and/or Trustee may appear.

4. To pay: (a) before delinquency, all taxes and assessments affecting said property, (including assessments on appurtenant water stock), and any costs or penalty thereon; (b) when due, all incumbrances (including any debt secured by Deed of Trust) and/or interest thereon, which appear to be liens or charges upon said property or any part thereof prior to this Deed of Trust; (c) all costs, fees and expenses of these Trusts, including cost of evidence of title and Trustee's fees in connec-

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tion with sale, whether completed or not, which amounts shall become due upon delivery to Trustee of Declaration of Default and Demand for Sale, as hereinafter provided.

5. To pay without demand, all sums expended by Trustee or Beneficiary under the terms hereof with interest from date of expenditure at the rate of ten per cent per annum.

B. Should Trustor fail or refuse to make any payment or do any act, which he is obligated hereunder to make or do, at the time and in the manner herein provided, then Trustee and/or Beneficiary, each in his sole discretion, may, without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof:

1. Make or do the same in such manner and to such extent as may be deemed necessary to protect the security of this Deed of Trust, either Trustee or Beneficiary being authorized to enter upon and take possession of said property for such purposes.

2. Commence, appear in or defend any action or proceeding affecting or purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder, whether brought by or against Trustor, Trustee or Beneficiary; or

3. Pay, purchase, contest or compromise any prior claim, debt, lien, charge or incumbrance which in the judgment of either may affect or appear to affect the security of this Deed of Trust, the interest of Beneficiary or the rights, powers and duties of Trustee hereunder.

Provided, that neither Trustee nor Beneficiary shall be under any obligation to make any of the payments or do

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any of the acts above mentioned, but, upon election of either or both so to do, employment of an attorney is authorized and payment of the fees of such attorney in a reasonable sum is hereby secured.

C. Trustee shall be under no obligation to notify any party hereto of any action or proceeding of any kind in which Trustor, Beneficiary and/or Trustee shall be named as defendant, unless brought by Trustee.

D. Acceptance by Beneficiary of any sum in payment of any indebtedness secured hereby, after the date when the same is due, shall not constitute a waiver of the right either to require prompt payment, when due, of all other sums so secured or to declare default as herein provided for failure so to pay.

E. Trustee may, at any time, or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed of Trust and the note secured hereby for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby or the effect of this Deed of Trust upon the remainder of said property:

1. Reconvey any part of said property;
2. Consent in writing to the making of any map or plat thereof; or
3. Join in granting any easement thereon.

F. Upon payment of all sums secured hereby and surrender to Trustee, for cancellation, of this Deed of Trust and the note secured hereby, Trustee, upon receipt

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from Beneficiary of a written request reciting the fact of such payment and surrender, shall reconvey, without warranty, the estate then held by Trustee, and the Grantee in such reconveyance may be described in general terms as "the person or persons legally entitled thereto," and Trustee is authorized to retain this Deed of Trust and such note. The recitals in such reconveyance of any matters or facts shall be conclusive proof against all persons of the truthfulness thereof.

G. 1. Should breach or default be made by Trustor in payment of any indebtedness secured hereby and/or in performance of any obligation, covenant, promise or agreement herein, or in said note contained, then Beneficiary may declare all sums secured hereby immediately due by the execution and delivery to Trustee of a written Declaration of Default and Demand for Sale, whereupon all sums secured hereby shall become and be immediately due and payable, and shall surrender to Trustee this Deed of Trust, the note and receipts or other documents evidencing any expenditure secured thereby.

Beneficiary shall also execute and deliver to Trustee a written notice of such breach or default and of his election to cause to be sold the herein described property to satisfy the obligations hereof, and thereafter Trustee shall cause such notice to be recorded in the office of the recorder of the county or counties wherein said real property or some part thereof is situated.

Beneficiary, from time to time before Trustee's sale, may rescind any such notice of breach or default and of election to cause to be sold said property by executing and delivering to Trustee a written notice of such rescission,

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which notice, when recorded in the office of the recorder of the aforesaid county or counties, shall also constitute a cancellation of any prior Declaration of Default and Demand for Sale. The exercise by Beneficiary of such right of rescission shall not constitute a waiver of any breach or default, then existing or subsequently occurring, or impair the right of Beneficiary to execute and deliver to Trustee, as above provided, other Declarations of Default and Demand for Sale, and notices of breach or default and of election to cause to be sold said property to satisfy the obligations hereof, nor otherwise affect any provision, covenant or condition of said note and of this Deed of Trust or any of the rights, obligations or remedies of the parties thereunder.

2. After three months shall have elapsed following recordation of any such notice of breach or default and of election to cause to be sold said property, as to which no notice of rescission has been recorded, Trustee, without demand on Trustor, shall sell said property, as herein provided, at such time and at such place in the State of California as the Trustee, in its sole discretion, shall deem best to accomplish the objects of these Trusts, having first given notice of the time and place of such sale in the manner and for a time not less than that required by the laws of the State of California for sales of real property under Deeds of Trust.

3. Trustee may postpone sale of all, or any portion, of said property by public announcement at the time fixed by said notice of sale, and may thereafter postpone said sale from time to time by public announcement at the time fixed by the preceding postponement; and without

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further notice it may make such sale at the time to which the same shall be so postponed, provided, however, that the sale or any postponement thereof must be made at the place fixed by the original notice of sale.

4. At the time of sale so fixed, Trustee may sell the property so advertised, or any part thereof, either as a whole or in separate parcels at its sole discretion, at public auction, to the highest bidder for cash in United States gold coin, all payable at time of sale, and after any such sale and due payment made, shall execute and deliver to such purchaser a deed or deeds conveying the property so sold, but without covenant or warranty, express or implied, regarding title, possession or incumbrances. Trustor hereby agrees to surrender immediately and without demand possession of said property to such purchaser. The recitals in such deed or deeds of any matters or facts affecting the regularity or validity of said sale shall be conclusive proof of the truthfulness thereof and such deed or deeds shall be conclusive against all persons as to all matters or facts therein recited. Trustee, Beneficiary, any person on behalf of either, or any other person, may purchase at such sale.

H. Trustee shall apply the proceeds of any such sale to payment of:

1. (a) Expenses of sale; (b) all costs, fees, charges and expenses of Trustee and of these Trusts, including

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cost of evidence of title and Trustee's fee in connection with sale;

2. All sums expended under the terms hereof, not then repaid, with accrued interest at the rate of ten per cent per annum;

3. Accrued interest on said note;

4. Unpaid principal of said note; or if more than one, the unpaid principal thereof pro rata and without preference or priority; and

5. The remainder if any to the person or persons legally entitled thereto, upon proof of such right.

I. This Deed of Trust in all its parts applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns.

J. Trustee accepts these Trusts when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law.

In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

In Witness Whereof Trustor has executed this instrument.

FARM HOME BUILDERS,
INCORPORATED

By F. D. Hall, President

By Erwin S. Hall, Secretary

(Corporate Seal)

(Petitioners' Exhibit No. 1)

EXHIBIT "C"

Exhibit "A" and "F"

<u>Lot</u>	<u>Description</u>		Exhibit "A"	Exhibit "F"
	<u>Parcel</u>		<u>Minimum Selling Price</u>	<u>Release Price</u>
W-1/2 1	A		53.00	36.00
	B		52.00	36.00
	C		68.00	68.00
	D		81.00	54.00
	E		81.00	54.00
	F		80.00	54.00
	G		80.00	80.00
	H		80.00	80.00
2	D		56.00	56.00
	E		66.00	66.00
	F		75.00	75.00
	G		84.00	84.00
	H		95.00	95.00
	I		105.00	105.00
	J		73.00	49.00
	K		71.00	49.00
	L		71.00	71.00
	M		71.00	71.00
	N		71.00	71.00
	O		71.00	71.00
3	P		36.00	36.00
	Q		38.00	38.00
	R		39.00	39.00
	S		41.00	41.00
	A		144.00	144.00
	C		179.00	179.00
	E		220.00	220.00

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Lot	Description Parcel	Exhibit "A"	Exhibit "F"
		Minimum Selling Price	Release Price
4	F	30.00	20.00
	G	30.00	20.00
	H	44.00	30.00
	I	110.00	73.00
	J	140.00	140.00
	A	60.00	60.00
	B	102.00	102.00
	C	147.00	147.00
	D	193.00	193.00
	E	170.00	170.00
7	A	632.00	422.00
	B	620.00	414.00
	C	620.00	414.00
	D	620.00	414.00
10	A	633.00	422.00
	B	620.00	414.00
	C	620.00	414.00
	D	620.00	414.00
11	A	633.00	422.00
	B	620.00	414.00
	C	620.00	414.00
	D	620.00	414.00
13	A	620.00	414.00
	B	620.00	414.00
	C	250.00	250.00
	D	245.00	164.00
	E	245.00	164.00
	F	245.00	164.00
	G	267.00	178.00
14	A	162.00	162.00

(Petitioners' Exhibit No. 1)

Description		Exhibit "A"	Exhibit "F"
Lot	Parcel	Minimum Selling Price	Release Price
14	B	162.00	162.00
	E	123.00	82.00
	F	110.00	110.00
	G	110.00	110.00
	H	158.00	158.00
16	A	575.00	384.00
	B	625.00	417.00
	C	310.00	207.00
	D	313.00	209.00
	E	365.00	243.00
	F	313.00	209.00
17	A	585.00	390.00
	B	275.00	184.00
	C	357.00	238.00
	D	312.00	208.00
	E	315.00	208.00
	F	340.00	227.00
	G	317.00	211.00
18	A	445.00	297.00
	B	445.00	297.00
	C	445.00	297.00
	D	444.00	297.00
	E	423.00	282.00
	F	423.00	282.00
19	A	292.00	292.00
	B	292.00	195.00
	C	292.00	195.00
	D	292.00	195.00
	E	278.00	185.00
	F	279.00	186.00

(Petitioners' Exhibit No. 1)

Description		Exhibit "A"	Exhibit "F"
Lot	Parcel	Minimum Selling Price	Release Price
20	A	292.00	292.00
	B	292.00	195.00
	C	292.00	292.00
	D	292.00	292.00
	E	228.00	152.00
	F	269.00	180.00
21	A	292.00	292.00
	B	292.00	292.00
	C	439.00	293.00
	D	362.00	241.00
22	A	291.00	291.00
	B	294.00	294.00
	C	294.00	294.00
	D	304.00	203.00
	E	277.00	185.00
	F	265.00	177.00
24	A	292.00	292.00
	B	286.00	286.00
	C	290.00	290.00
	D	303.00	202.00
25	A	292.00	292.00
	B	286.00	286.00
	C	286.00	191.00
	D	286.00	191.00
26	A	634.00	423.00
	B	622.00	415.00
	C	622.00	415.00
	D	622.00	415.00
27	A	292.00	195.00
	B	286.00	286.00

(Petitioners' Exhibit No. 1)

Description		Exhibit "A"	Exhibit "F"
Lot	Parcel	Minimum Selling Price	Release Price
28	C	286.00	286.00
	D	286.00	286.00
	A	292.00	292.00
	C	286.00	286.00
	D	286.00	286.00
29 and 31		12,000.00	12,000.00
32	A	275.00	275.00
	B	300.00	300.00
	C	300.00	300.00
	D	275.00	184.00
	W 9.93	1,144.00	763.00
33	A-	356.00	356.00
	B	322.00	322.00
	C	322.00	322.00
34	A	250.00	250.00
	B	249.00	166.00
	C	249.00	249.00
	D	252.00	252.00
36		2,185.00	1,457.00
39	A	250.00	250.00
	B	249.00	249.00
	C	250.00	250.00
	D	252.00	290.00
40	A	230.00	230.00
	B	514.00	514.00
	C	250.00	250.00
41	A	345.00	230.00
	B	315.00	315.00
	C	315.00	315.00
	D	310.00	310.00

(Petitioners' Exhibit No. 1)

Description		Exhibit "A"	Exhibit "F"
Lot	Parcel	Minimum Selling Price	Release Price
42	A	290.00	290.00
	B	286.00	286.00
	C	287.00	287.00
	D	287.00	287.00
43	B	143.00	143.00
	C	144.00	96.00
	D	177.00	177.00
	E	372.00	372.00
	F	382.00	382.00
44	A	297.00	198.00
	B	245.00	164.00
	C	270.00	180.00
	D	2,310.00	2,021.25
	E	260.00	174.00
	F	240.00	160.00
	G	300.00	200.00
47	A	523.00	349.00
	B	430.00	287.00
	C	500.00	334.00
	D	275.00	184.00
	E	275.00	184.00
	F	510.00	340.00
	G	530.00	353.00
	H	245.00	164.00
	I	325.00	217.00
48	A	432.00	288.00
	B	372.00	248.00
	C	332.00	221.00
	D	457.00	305.00
	E	717.00	478.00

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Lot	Description Parcel	Exhibit "A"	Exhibit "F"
		Minimum Selling Price	Release Price
49	F	675.00	350.00
	G	680.00	453.00
	H	575.00	384.00
	A	402.00	268.00
	B	475.00	317.00
	C	452.00	302.00
	D	392.00	262.00
	E	198.00	132.00
50	F	210.00	140.00
	G	240.00	160.00
	H	285.00	190.00
	A	234.00	156.00
	B	250.00	167.00
	C	240.00	160.00
	D	360.00	240.00
	E	395.00	264.00
51	F	200.00	134.00
	G	332.00	222.00
	H	300.00	200.00
	A	370.00	247.00
	B	370.00	370.00
	C	370.00	247.00
	E	100.00	100.00
	F	103.00	103.00
52	G	107.00	107.00
	H	110.00	110.00
	I	114.00	114.00
	A	290.00	290.00
	B	287.00	287.00
	C	287.00	192.00

(Petitioners' Exhibit No. 1)

Description		Exhibit "A"	Exhibit "F"
Lot	Parcel	Minimum Selling Price	Release Price
53	D	286.00	286.00
	A	402.00	268.00
	B	314.00	314.00
	C	314.00	314.00
54	D	314.00	314.00
	A	316.00	211.00
	B	270.00	180.00
	C	308.00	308.00
56	D	308.00	206.00
	E	302.00	202.00
	A	280.00	280.00
	B	339.00	226.00
	C	334.00	334.00
	D	330.00	330.00
	E	624.00	416.00
57	F	304.00	304.00
	G	326.00	326.00
	A	276.00	276.00
	B	275.00	275.00
58	C	300.00	300.00
	D	300.00	300.00
	A	276.00	276.00
	B	276.00	276.00
59	C	300.00	300.00
	A	290.00	290.00
	B	287.00	287.00
	C	287.00	287.00
60	D	286.00	286.00
	A	290.00	194.00
	B	287.00	287.00

(Petitioners' Exhibit No. 1)

Lot	Description Parcel	Exhibit "A"	Exhibit "F"
		Minimum Selling Price	Release Price
61	C	287.00	287.00
	D	286.00	191.00
	A	530.00	354.00
	B	135.00	90.00
61	C	150.00	100.00
	D	187.00	125.00
	E	367.00	367.00
	F	381.00	381.00
62	A	298.00	298.00
	B	298.00	298.00
	C	298.00	298.00
	D	150.00	150.00
	E	145.00	145.00
	F	151.00	151.00
	G	155.00	155.00
	H	125.00	125.00
	I	130.00	130.00
63	A	227.00	227.00
	B	390.00	260.00
	C	390.00	260.00
	D	414.00	278.00
	E	154.00	103.00
	F	175.00	175.00
64	A	232.00	155.00
	B	348.00	348.00
	C	348.00	348.00
	D	348.00	348.00
	E	230.00	154.00
	F	260.00	174.00
65	A	658.00	439.00

(Petitioners' Exhibit No. 1)

		Exhibit "A"	Exhibit "F"
Description		Minimum	Release
Lot	Parcel	Selling Price	Price
66	B	440.00	294.00
	C	442.00	295.00
	D	314.00	210.00
	E	421.00	314.00
	F	381.00	254.00
	G	343.00	229.00
	A	447.00	298.00
	B	438.00	292.00
	C	385.00	257.00
	D	333.00	222.00
	E	380.00	254.00
	F	370.00	247.00
	G	370.00	247.00
	H	366.00	244.00
67	A	300.00	200.00
	B	315.00	210.00
	C	330.00	220.00
	D	306.00	204.00
	E	326.00	218.00
	F	345.00	230.00
68	A	375.00	250.00
	B	375.00	250.00
	C	377.00	252.00
	D	273.00	182.00
	E	288.00	192.00
	F	305.00	204.00
69	A	385.00	257.00
	B	385.00	257.00
	D	210.00	140.00
	E	213.00	142.00

(Petitioners' Exhibit No. 1)

Lot	Description Parcel	Exhibit "A"	Exhibit "F"
		Minimum Selling Price	Release Price
70	F	225.00	150.00
	A	385.00	257.00
	B	395.00	264.00
	C	398.00	266.00
	D	395.00	264.00
71	E	363.00	242.00
	F	370.00	247.00
	G	376.00	251.00
	H	387.00	258.00
	A	445.00	297.00
72	B	400.00	267.00
	C	374.00	249.00
	D	359.00	240.00
	E	408.00	272.00
	F	418.00	279.00
	G	450.00	300.00
	H	412.00	275.00
	A	455.00	304.00
	B	455.00	304.00
	C	455.00	304.00
	D	453.00	304.00
	E	404.00	269.00
73	F	413.00	276.00
	G	424.00	283.00
	H	434.00	295.00
	A	442.00	295.00

(Petitioners' Exhibit No. 1)

Description		Exhibit "A"	Exhibit "F"
Lot	Parcel	Minimum Selling Price	Release Price
74	B	395.00	263.00
	C	440.00	293.00
	D	372.00	248.00
	E	385.00	256.00
	F	354.00	236.00
	G	370.00	247.00
	H	685.00	457.00
	A	327.00	218.00
75	B	326.00	218.00
	C	277.00	185.00
	D	326.00	218.00
	E	874.00	583.00
	A	465.00	310.00
76	B	466.00	310.00
	C	466.00	310.00
	D	584.00	389.00
	A	145.00	97.00
	B	148.00	148.00
	C	150.00	100.00
	D	153.00	102.00
	E	155.00	102.00
77	F	159.00	106.00
	G	162.00	108.00
	H	306.00	204.00
	A	55.00	37.00
	B	56.00	37.00

(Petitioners' Exhibit No. 1)

Lot	Description Parcel	Exhibit "A"	Exhibit "F"
		Minimum Selling Price	Release Price
	C	56.00	37.00
	D	56.00	37.00
	E	60.00	40.00
	F	60.00	60.00
	G	60.00	60.00
	H	80.00	80.00
	I	80.00	80.00
	J	288.00	288.00
	K	309.00	309.00
	L	326.00	326.00
	M	332.00	332.00
	N	270.00	270.00
	O	275.00	275.00
	P	139.00	139.00
	R	102.00	102.00
78		100.00	100.00
79		100.00	100.00
80	A	370.00	247.00
	B	380.00	253.00
	C	380.00	253.00
	D	379.00	253.00
	E	399.00	266.00
	F	392.00	264.00
	G	385.00	256.00
	H	329.00	220.00
	I	290.00	193.00

(Petitioners' Exhibit No. 1)

Description		Exhibit "A"	Exhibit "F"
Lot	Parcel	Minimum Selling Price	Release Price
81	A	179.00	120.00
	B	274.00	183.00
	C	370.00	247.00
	D	430.00	287.00
82	A	373.00	249.00
	B	408.00	272.00
	C	320.00	214.00
	D	310.00	207.00
	E	299.00	200.00
83	A	398.00	266.00
	B	390.00	260.00
	C	384.00	256.00
	D	388.00	259.00
	E	439.00	293.00
	F	502.00	335.00
	G	702.00	468.00
	H	1,037.00	692.00
84	A	257.00	172.00
	B	297.00	198.00
	C	572.00	382.00
	D	521.00	348.00
	E	614.00	410.00
85	A	335.00	224.00
	B	200.00	134.00
	C	192.00	128.00
	D	291.00	194.00

(Petitioners' Exhibit No. 1)

Description		Exhibit "A"	Exhibit "F"
Lot	Parcel	Minimum Selling Price	Release Price
86	E	795.00	530.00
	F	525.00	350.00
	A	427.00	285.00
	B	266.00	178.00
	C	255.00	170.00
87	D	114.00	76.00
	A	281.00	188.00
	B	239.00	160.00
	C	223.00	149.00
	D	261.00	174.00
88	E	254.00	170.00
	F	138.00	92.00
	G	347.00	232.00
	A	368.00	246.00
	B	462.00	308.00
89	C	475.00	317.00
	D	553.00	369.00
	E	512.00	342.00
	A	491.00	328.00
	B	448.00	299.00
	C	737.00	737.00

(Petitioners' Exhibit No. 1)

Description		Exhibit "A"	Exhibit "F"
Lot	Parcel	Minimum Selling Price	Release Price
<u>Section:</u>			
	1 - Tn. 6N, R14W -	24,000.00	16,000.00
	2 - SW 1/4 of 2 (North of Road -	8,775.00	8,775.00
	- " " (South of Road -	12,250.00	12,250.00
	- " " SE 1/4 -	4,075.00	3,050.00
11	A	2,500.00	1,667.00
	B	2,500.00	1,667.00
	C	2,500.00	1,667.00
	D	2,500.00	1,667.00
	E	4,750.00	3,500.00
	F	5,600.00	3,733.00
	G	1,800.00	1,200.00
	H	2,600.00	1,734.00
	I	2,250.00	1,500.00
	J	2,400.00	1,600.00
12	A	2,200.00	1,467.00
	B	2,000.00	1,337.00
	C	1,750.00	1,167.00
	D	2,900.00	1,934.00
	E	6,400.00	4,267.00
	F	1,450.00	1,067.00
	G	950.00	633.00
	H	2,400.00	1,600.00
	I	2,300.00	1,567.00
	J	1,550.00	1,034.00
	K	1,400.00	934.00

(Petitioners' Exhibit No. 1)

Description		Exhibit "A"	Exhibit "F"
Lot	Parcel	Minimum Selling Price	Release Price
	L	2,000.00	1,334.00
	M	1,600.00	1,067.00
	N	2,250.00	1,533.00
	O	3,050.00	2,033.00
	P	3,850.00	2,564.00
	Q	3,050.00	2,033.00
	R	3,050.00	2,033.00
	S	1,450.00	967.00
	T	2,400.00	1,600.00
	U	4,000.00	2,667.00
	V	3,600.00	2,400.00
	W	4,850.00	3,234.00
	X	2,200.00	1,467.00
	Y	2,200.00	1,467.00
G	A	288.00	288.00
	B	287.00	287.00
	C	267.00	178.00
	E	499.00	333.00
H	A	281.00	187.00
	B	281.00	281.00
	C	344.00	344.00
	D	294.00	294.00
	E	288.00	192.00
	F	288.00	192.00
	G	237.00	158.00
	H	224.00	224.00
		<hr/>	<hr/>
		\$297,221.00	\$222,190.25
		<hr/>	<hr/>

(Petitioners' Exhibit No. 1)

CONTRACT BALANCES AS OF DECEMBER 2, 1929

<u>Contract No.</u>	<u>Purchaser</u>	<u>Lot No.</u>	<u>Date of Contract</u>
1	Jennie Finn	4-C	9-11-27
3	James C. Nordling	27-B	9-19-27
4	Doris Anderson	33-A	8-29-27
6	Celia Coppersmith	2-H & I	9-8-27
8	A. M. Porter	14-H	10-9-27
9	Doris Anderson	3-A	12-14-27
10	W. J. Stewart	3-J	10-26-27
11	Theresa Diestal	2-P	10-9-27
12	Ida E. Smith	14-A	10-17-27
15	James C. Nordling	25-A	10-14-27
16	Marie Baker	2-D	10-3-27
18	Grace Heinzmann	41-C & B	1-5-28
19	Josephine Berberich	41-B-53-B	1-12-28
21	Robert Rendfrew	79	3-16-28
22	W. A. Lorimer	34-C	9-21-27
23	Carl Hernzberg	33-B	11-7-27
25	Theresie Schweder	3-E	3-16-28
26	Louis H. Sroufe	77-I	3-16-28
27	Harry M. Lindsey	2-F	2-20-28
28	Fanney Forrester	43-B	11-12-27
29	Ruth W. Johnson	58-C	4-18-28
30	George W. Matlock	56-A	4-5-28
31	John McGillwray	61-E	3-8-28
32	Louis M. Sroufe	19-A	2-2-28
33	Lena A. Klapper	2-D & E	3-28-29
34	Ella I. Long	3-C	4-17-28
35	W. A. Rosenfeld	4-B	4-20-28
36	Rinnie Lawing	25-B	5-12-28
37	Rose N. McNalley	52-A	12-6-27
38	Leona Valley Country Club	29-31	7-5-28

<u>Selling Price</u>	<u>Balance Due</u>	<u>Phillips and Hambaugh Equity</u>	<u>P. A. Bank Release</u>	<u>Interest Paid to</u>
750.00	271.94	124.94	147.00	11-4-29
1,407.00	378.51	92.51	286.00	11-20-29
1,745.00	578.06	222.06	356.00	10-12-29
700.00	269.78	69.78	200.00	7-8-29
950.00	514.53	356.53	158.00	1-9-28
450.00	219.42	75.42	144.00	10-12-29
500.00	143.28	3.28	140.00	10-26-29
350.00	203.69	167.69	36.00	4-9-29
950.00	275.16	113.16	162.00	5-17-29
1,435.00	423.11	131.11	292.00	11-14-29
350.00	174.83	90.83	84.00	5-3-28
3,067.95	1,201.50	576.50	625.00	5-4-29
3,085.10	667.52	.....	667.52	10-12-29
750.00	342.05	242.05	100.00	9-31-29
1,226.00	419.53	170.53	249.00	10-22-29
1,582.00	493.33	171.33	322.00	11-7-29
750.00	329.42	109.42	220.00	1-16-29
450.00	223.01	143.01	80.00	11-28-29
375.00	255.55	180.55	75.00	10-20-28
594.50	201.97	58.97	143.00	9-12-29
1,469.00	434.07	134.07	300.00	9-18-29
1,350.00	537.73	257.73	280.00	11-5-29
1,522.00	731.15	364.15	367.00	2-8-29
1,435.00	666.44	374.44	292.00	10-2-28
700.00	329.77	207.77	122.00	11-28-29
700.00	297.40	118.40	179.00	11-13-29
550.00	209.92	107.92	102.00	6-20-29
1,407.00	500.23	214.23	286.00	8-12-29
1,424.00	694.27	404.27	290.00	7-9-28
16,000.00	12,100.61	100.61	12,000.00	10-5-29

(Petitioners' Exhibit No. 1)

<u>Contract No.</u>	<u>Purchaser</u>	<u>Lot No.</u>	<u>Date of Contract</u>
39	Friedrieka Moeller	28-C	4-30-28
40	Sarah I. Erwin	4-D	4-3-28
41	Eliz. C. Bissell, Gdn.	61-F	5-21-28
42	Charles Randolph	58-A	7-3-28
43	John A. Johnson	32-B	6-7-28
44	George D. Luetke	78	1-8-28
45	Emma A. Worf	4-E	3-21-28
46	B. T. Nesmith	43-F	6-18-28
47	Emil Gsell	24-C	6-13-27
48	Annie M. Skillman	28-D	4-11-28
50	R. Hambaugh	44-D	7-24-28
51	Eliz. S. Candon	28-A	2-10-28
52	Martha E. Spangler	14-G	2-28-28
53	Nellie M. Morrell	51-I	2-3-28
54	J. B. Good	4-F	3-2-28
55	L. E. Prall	43-D	4-14-28
56	C. W. Guimont	14-B	7-9-28
57	Frederica Muller	32-A	5-12-28
58	Earl Van Horn	59-C & D	5-11-28
59	G. V. Voorhis	52-D	6-20-28
60	H. W. Milner	33-C	5-20-28
61	Agnes B. Elliott	1-G & H	3-21-28
62	Morgan N. Smith	43-E	8-7-29
63	Theresa Diestel	77-J	7-1-28
64	Chas. Sundstrom	57-B	6-6-28
66	Fred Koerner	1-C	7-30-28
67	Kathryn E. Kelley	2-Q	7-26-28
68	Lena Klapper	2-N & O	6-2-28
69	Clarence Bates	63-A	5-11-28

Petitioners' Exhibit No. 1)

<u>Selling Price</u>	<u>Balance Due</u>	<u>Phillips and Hambaugh Equity</u>	<u>P. A. Bank Release</u>	<u>Interest Paid to</u>
1,407.00	553.48	267.48	286.00	10-29-29
900.00	311.79	118.79	193.00	11-3-29
1,580.50	719.38	338.38	381.00	6-21-29
1,350.00	502.87	226.87	276.00	11-3-29
1,344.00	490.47	190.47	300.00	11-7-29
650.00	305.92	205.92	100.00	10-14-29
950.00	300.68	130.68	170.00	11-21-29
1,580.50	663.45	281.45	382.00	11-18-29
1,430.00	400.00	110.00	290.00	11-13-29
1,407.00	576.33	290.33	286.00	11-11-29
3,080.00	2,031.46	10.21	2,021.25	10-27-29
1,435.00	707.72	415.72	292.00	2-10-28
800.00	451.30	341.30	110.00	2-28-28
471.25	279.28	165.28	114.00	2-3-28
975.00	.....	.....	.....	.....
732.00	363.62	186.62	177.00	5-14-29
950.00	371.17	209.17	162.00	11-9-29
1,344.00	607.57	332.57	275.00	10-12-28
2,418.00	1,364.50	791.50	573.00	5-11-28
1,407.00	509.15	223.15	286.00	11-20-29
1,582.00	573.62	251.62	322.00	8-20-29
700.00	347.85	187.85	160.00	10-11-29
1,544.25	676.66	304.66	372.00	8-7-29
900.00	542.67	255.67	288.00	11-2-29
1,350.00	568.99	293.99	275.00	10-6-29
475.00	161.29	93.29	68.00	11-30-29
350.00	200.61	162.61	38.00	11-2-29
700.00	288.30	146.30	142.00	11-2-29
835.00	435.81	208.81	227.00	8-1-28

(Petitioners' Exhibit No. 1)

<u>Contract No.</u>	<u>Purchaser</u>	<u>Lot No.</u>	<u>Date of Contract</u>
70	Wilbur W. Wheeler	60-C	7-26-28
71	Anna S. Smith	63-F	6-21-28
72	Celia Coppersmith	51-F	3-22-28
73	Carl E. Curry	34-D	7-26-28
74	Katherine Waltz	77-F & G	3-26-28
75	L. W. Stewart	64-C	7-26-28
76	Jack Byers	G-A	7-26-28
77	Wm. T. Mann	14-F & C	7-26-28
78	Wm. A. Purcell	21-A-22-B	7-26-28
79	C. G. Lawrence	77-F	7-26-28
80	Perry R. Youngs	64-B	7-26-28
81	Cecilia E. Coppersmith	51-E	4-6-28
82	Kathryn E. Kelley	2-R	7-26-28
84	R. Dunker	53-C	7-26-28
87	Joseph A. Gaylord	39-C	7-26-28
88	Andrew H. Hastie	77-M & N	7-26-28
90	Kathryn E. Kelly	77-C	12-15-2
91	Wm. P. Bradbury	2-L & M	5-22-29
92	Lillian F. Gaylord	77-H	7-13-28
96	Ben E. Segur	60-B	7-26-28
97	Michael J. Maher	53-D	7-26-28
98	Noble B. White	77-L	7-26-28
100	Virginia Clark	76-B	7-26-28
101	Carl C. Camp	51-B-77-R	5-3-28
102	Ivy J. Weibe	57-C & D	6-19-28
103	Hannah E. Ezekiel	13-C	10-3-27
105	Jack Adams	51-G & H	6-29-28
106	Joseph A. Gaylord	34-A	5-11-28
108	George W. Patterson	4-A	11-27-2

<u>Selling Price</u>	<u>Balance Due</u>	<u>Phillips and Hambaugh Equity</u>	<u>P. A. Bank Release</u>	<u>Interest Paid to</u>
,407.00	682.87	395.87	287.00	7-26-28
638.00	348.44	173.44	175.00	6-21-28
500.00	285.11	182.11	103.00	6-22-28
,237.00	490.87	238.87	252.00	11-22-29
700.00	375.80	255.80	120.00	3-26-28
,750.00	944.61	596.61	348.00	1-5-29
,407.00	546.60	258.60	288.00	11-2-29
800.00	388.08	278.08	110.00	5-8-29
,325.00	2,127.32	1,247.32	880.00	5-31-29
,650.00	996.32	687.32	309.00	9-1-29
,750.00	902.39	554.39	348.00	2-4-29
500.00	264.51	164.51	100.00	6-6-29
350.00	200.61	161.61	39.00	10-26-29
,537.00	655.78	341.78	314.00	11-2-29
,226.00	513.25	263.25	250.00	8-8-29
,950.00	1,660.29	1,058.29	602.00	11-21-29
900.00	648.32	373.32	275.00	3-15-29
550.00	380.85	238.85	142.00	10-22-29
400.00	273.92	193.92	80.00	12-13-28
,407.00	682.87	395.87	287.00	7-26-28
,575.00	815.72	501.72	314.00	11-17-29
,600.00	977.02	651.02	326.00	7-26-28
700.00	392.09	244.09	148.00	11-8-29
,2,125.00	1,148.40	676.40	472.00	5-3-28
,2,938.00	1,194.16	594.16	600.00	5-19-29
950.00	433.16	183.16	250.00	12-3-28
,000.00	463.94	246.94	217.00	6-29-29
,226.00	475.52	225.52	250.00	9-11-29
350.00	205.51	145.51	60.00	4-27-29

(Petitioners' Exhibit No. 1)

<u>Contract No.</u>	<u>Purchaser</u>	<u>Lot No.</u>	<u>Date of Contract</u>
109	S. F. Garney	62-A to I Inc.	10-8-28
110	W.R.Kemp SW $\frac{1}{4}$ of Sec.2, 26N R14W (160A)		10-15-28
112	H. J. Mersterman	39-A & B-40-C	10-10-28
113	Isaac C. Rice	H-C	10-5-28
114	Louis H. Sroufe	22-A	10-10-28
115	E. L. Byar	56-F & G	10-12-28
116	Chas. Rudolph	64-D	1-19-29
117	Lola W. Broadhead	H-H	2-19-29
118	Alfred L. Spangenberg	57-A-58-B	4-24-29
119	L. P. Stanford	32-C	3-18-29
120	Thos. J. Berry	40-B	5-14-29
121	Isaac C. Rice	H-D	5-14-29
122	Myrtle R. Rice	2-S	5-14-29
123	R. W. Jefferys	89-C	5-14-29
124	G. D. Meldrin	56-C	5-15-29
125	A. F. Roberts	59-A & B	5-15-29
126	Gertrude Anthony	56-D	5-14-29
127	T. B. Robertson	27-C & D	5-15-29
128	G. V. Fisher	24-A & B	5-20-29
129	Arthur F. Thompson	42-A	6-10-29
130	A. R. Shipley	20-C & D	5-15-29
131	Ernest Beauvois	54-C	5-15-29
132	A. O. Read	42-C & D	5-15-29
134	Agnes Murphy	40-A	6-15-29
135	Samuel A. Pascoe	H-B	5-14-29
136	Kathryn E. Kelley	42-B	6-15-29
139	J. Monahan	77-P	6-26-29
141	C. F. Forester	39-D	6-26-29
142	H. Long	52-B	6-28-29
143	J. L. Thiessen	20-A-21-B	5-27-29
144	Celia J. Ranney	G-B	6-29-29

<u>Selling Price</u>	<u>Balance Due</u>	<u>Phillips and Hambaugh Equity</u>	<u>P. A. Bank Release</u>	<u>Interest Paid to</u>
,775.00	5,636.13	3,886.13	1,750.00	10-8-28
,980.00	24,786.11	3,761.11	21,025.00	4-15-29
,678.00	2,159.76	1,410.76	749.00	10-10-28
,725.00	957.00	613.00	344.00	4-5-29
,935.00	537.80	246.80	291.00	11-10-29
,675.00	914.35	284.35	630.00	10-2-29
,545.00	700.75	352.75	348.00	10-19-29
,125.00	455.94	231.94	224.00	11-19-29
,700.00	1,089.06	537.06	552.00	11-24-29
,350.00	618.74	318.74	300.00	7-18-29
,524.00	1,157.54	643.54	514.00	9-14-29
,475.00	905.19	611.19	294.00	7-14-29
,250.00	182.75	141.75	41.00	8-14-29
,350.00	1,006.55	269.55	737.00	7-14-29
,700.00	1,040.82	706.82	334.00	8-15-29
,200.00	706.87	129.87	577.00	10-15-29
,650.00	1,016.18	686.18	330.00	9-14-29
,813.70	1,400.53	828.53	572.00	12-15-29
,835.00	1,239.41	661.41	578.00	11-20-29
,424.00	746.50	456.50	290.00	6-10-29
,870.00	1,398.18	814.18	584.00	5-15-29
,525.00	887.22	579.22	308.00	11-14-29
,500.00	1,561.58	987.58	574.00	7-15-29
,150.00	739.00	509.00	230.00	6-15-29
,435.00	776.25	495.75	281.00	5-14-29
,400.00	1,010.64	724.64	286.00	10-15-29
,750.00	564.00	425.00	139.00	6-26-29
,800.00	580.00	290.00	290.00	6-26-29
,400.00	776.30	489.30	287.00	6-28-29
,500.00	1,363.94	779.94	584.00	6-27-29
,550.00	743.28	456.28	287.00	11-29-29
	<u>116,526.42</u>	<u>46,979.65</u>	<u>69,546.77</u>	

(Petitioners' Exhibit No. 1)

EXHIBIT "D"

AMENDMENT TO DECLARATION OF
TRUST NO. 5873

This Supplementary Agreement and Amendment to Declaration of Trust made and entered into, in quadruplicate, this 28th day of October, 1935, by and between Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, as Trustee, party of the first part; Farm Home Builders, Incorporated, a corporation, as Trustor and/or Beneficiary, party of the second part; Pan American Bank of California, a corporation, now in process of liquidation, by John McFaul, Special Deputy Superintendent of Banks, in charge of said Liquidation, at first Payee, party of the third part; and Phillips & Hambaugh Realty & Construction Company, a corporation, as second Payee, party of the fourth part.

Witnesseth:

That, Whereas, on, to-wit, the 2nd day of December, 1929, a certain Declaration of Trust No. 5873 was made and entered into by and between the respective parties hereinabove described, wherein is set forth the terms, conditions, trusts, covenants and agreements under which the title to certain real and/or personal property therein more particularly described, is held in Trust by the said Trustee, and the particular terms and conditions under which the same is to be sold, assigned, transferred or conveyed; and

Whereas, in Subdivision "A", Paragraph 3 of said Declaration of Trust, it is provided that no Lot or Parcel of

(Petitioners' Exhibit No. 1)

real property shall be sold for less than the price listed in the Schedule of Minimum Selling Prices to be established by the Beneficiary and approved by the Trustee and first Payee, the total of which schedule is to be not less than Two Hundred Ninety-Five Thousand and No/100 (\$295,000.00) Dollars; and

Whereas, a Schedule of Minimum Selling Prices as above referred to was approved by the parties to said Trust, and was attached to and thereby became a part of said Declaration of Trust; and

Whereas, it is now desired to modify and amend said Declaration of Trust in respect to certain now amended release prices for certain Parcels of real property now held by said Trustee under said Declaration of Trust in order to facilitate the sale thereof and to establish a new Schedule of amended Release Prices for said Parcels under said Trust.

Now, Therefore, it is hereby mutually agreed that said Declaration of Trust is hereby modified and amended in the following respects, to-wit:

1. That as to the several Lots and/or Parcels of real property therein set forth and described, the release prices on the sale thereof shall hereafter be as set forth in the Schedule attached hereto, designated as Exhibit "A", and made a part hereof.

2. That in all other respects the said Declaration of Trust shall be and remain in full force and effect and binding upon the respective parties hereto.

3. That by their respective signatures hereunto attached the several parties to this Agreement and Modi-

(Petitioners' Exhibit No. 1)

fication of Declaration of Trust do hereby ratify, approve and confirm the same, and do mutually covenant and agree, for themselves, their successors or assigns, to be and become bound thereby.

In Witness Whereof, the respective parties to this Agreement and Amendment to Declaration of Trust have hereunto caused their names and seals to be affixed by their proper officers thereunto duly authorized, this the day and year first above written.

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES, AS TRUSTEE

By HALCOTT B. THOMAS

Halcott B. Thomas, Vice President.

Seal

By CARL P. SMITH

Carl P. Smith, Assistant Trust Officer.

PARTY OF THE FIRST PART.

FARM HOME BUILDERS, INCORPORATED

By F. D. HALL

Seal

President.

By ERWIN S. HALL

Secretary

PARTY OF THE SECOND PART.

PAN AMERICAN BANK OF CALIFORNIA
in Liquidation

By JOHN McFAUL

Special Deputy Superintendent of Banks,
FIRST PAYEE

PARTY OF THE THIRD PART.

(Petitioners' Exhibit No. 1)

PHILLIPS & HAMBAUGH REALTY &
CONSTRUCTION COMPANY

By P. F. WOODIN

Seal

Vice President.

By C. F. FORESTER

Secretary.

SECOND PAYEE,
PARTY OF THE FOURTH PART.

EXHIBIT "A"

SCHEDULE OF RELEASE PRICES AS ESTABLISHED BY AMENDMENT TO DECLARATION OF TRUST NO. 5873 OF CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES

Description of <u>Property</u>	Release <u>Price</u>
All of Sec. 1, T. 6 N., R. 14 W.	\$10,000.00
Sec. 2, T. 6 N., R. 14 W.	
All of the SW 1/4, lying North of the County Road	2,000.00
Sec. 2, T. 6 N., R. 14 W.	
The West 1/2 of the S.W. 1/4 of the S.W. 1/4 and that portion of the West 1/2 of the N.W. 1/4 of the S.W. 1/4 lying South of the County Road	2,000.00
Sec. 2, T. 6 N., R. 14 W.	
All of the East 1/2 of the S.W. 1/4 of the S.W. 1/4, lying South of the County Road	1,000.00
Sec. 2, T. 6 N., R. 14 W.	
All of the S.E. 1/4 of the S.W. 1/4, lying South of the County Road	1,000.00

(Petitioners' Exhibit No. 1)

Description of Property	Release Price
Sec. 2, T. 6 N., R. 14 W.	
The S.W. 1/4 of the S.E. 1/4	2,000.00
Sec. 11, T. 6 N., R. 14 W.	
A	750.00
B	750.00
C	700.00
D	700.00
E	1,200.00
F	1,500.00
G	400.00
H	1,000.00
I	1,000.00
J	600.00
Sec. 12, T. 6 N., R. 14 W.	
A	750.00
B	650.00
C	500.00
D	800.00
E	2,000.00
F	500.00
G	300.00
H	700.00
I	700.00
J	500.00
K	500.00
L	700.00
M	500.00

(Petitioners' Exhibit No. 1)

<u>Description of Property</u>	<u>Release Price</u>
Sec. 12, T. 6 N., R. 14 W.	
N	600.00
O	800.00
P	1,000.00
Q	1,000.00
R	1,000.00
S	400.00
T	\$ 700.00
U	1,100.00
V	1,000.00
W	1,200.00
X	700.00
Y	700.00
Lot No. 26, Tract 5148:	
Parcel A	350.00
" B	350.00
" C	350.00
" D	350.00
Lots No. 29 and 31, Tract 5148	9,000.00
Lot No. 62, Tract 5148:	
Parcel A	235.00
" B	235.00
" C	235.00
" D	120.00
" E	107.00
" F	110.00
" G	115.00
" H	120.00
" I	123.00
Lot 89, Parcel C	600.00

(Petitioners' Exhibit No. 1)

EXHIBIT "E"

AMENDMENT TO DECLARATION OF
TRUST NO. 5873

This Supplementary Agreement and Amendment to Declaration of Trust made and entered into, in triplicate, this 9th day of February, 1939, by and between Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, as Trustee under its Trust No. 5873, party of the first part; Farm Home Builders, Incorporated, a corporation, as Trustor and/or Beneficiary, party of the second part; and Pan American Bank of California, a corporation, now in process of liquidation, by John McFaul, Special Deputy Superintendent of Banks, in charge of said Liquidation, as first Payee, party of the third part.

Witnesseth:

That, Whereas, on, to-wit, the 2nd day of December, 1929, a certain Declaration of Trust No. 5873, was made and entered into by and between the above parties, wherein is set forth the terms, conditions, trusts, covenants and agreements under which the title to certain real and/or personal property therein more particularly described, is held in Trust by the said Trustee, and the particular terms and conditions under which the same is to be sold, assigned, transferred or conveyed; and

Whereas, by a Supplementary Agreement and Amendment to the Declaration of said Trust was made and entered into on, to-wit, the 28th day of October, 1935, the release prices of certain parcels of property held by said

(Petitioners' Exhibit No. 1)

Trustee under said Declaration of Trust were amended as therein set forth; and

Whereas, it is now desired to again amend and modify the release prices of the property now remaining in said Trust in order to facilitate the sale thereof; and

Whereas, in Subdivision "A", Paragraph 3 of said Declaration of Trust, it is provided that no Lot or Parcel of real property shall be sold for less than the price listed in the Schedule of Minimum Selling Prices to be established by the Beneficiary and approved by the Trustee and first Payee, the total of which schedule is to be not less than Two Hundred Ninety-Five Thousand and No/100 (\$295,000.00) Dollars; and

Whereas, a Schedule of Minimum Selling Prices as above referred to was approved by the parties to said Trust, and was attached to and thereby became a party of said Declaration of Trust; and

Now, Therefore, it is hereby mutually agreed that said Declaration of Trust be and is hereby modified and amended in the following respects, to-wit:

1. That as to the several lots and parcels of real property now held under said Declaration of Trust, the new modified and amended release prices on the sale thereof shall hereafter be as set forth in the Schedule attached hereto, designated as Exhibit "A", and made a part hereof.

2. That the Schedule of Minimum Selling Prices hereinabove and in Subdivision "A", Paragraph 3 of said Declaration of Trust referred to, be cancelled, and in lieu thereof that the Trustee be authorized to accept and complete the sale of any of the lots and/or parcels of property hereinafter referred to for such sales prices and

(Petitioners' Exhibit No. 1)

upon such terms and conditions as may meet with its approval and as submitted to it by Farm Home Builders, Incorporated, F. D. Hall, or any authorized selling agent, provided, however, that the sales price of each such lot or parcel of property so requested and submitted to the Trustee for approval shall be for an amount sufficient to pay the modified and amended release price of such lot or parcel as hereinafter set forth, the selling commission, delinquent and current taxes, if any, Trustee's fees as provided in said Declaration of Trust, and all costs, charges and expenses of completing such sales.

3. That in the event of the cancellation of any present outstanding contracts or agreements to convey covering any of the lots or parcels of property hereinafter described and referred to either by surrender of the contract and quitclaim deed or appropriate court proceedings, in such event the minimum sales prices and release prices respectively of each of such lots or parcels of property shall be as herein provided.

4. That in all other respects the said Declaration of Trust shall be and remain in full force and effect and binding upon the respective parties hereto.

5. That by their respective signatures hereunto attached the several parties to this Agreement and Modification of Declaration of Trust do hereby ratify, approve and confirm the same, and do mutually covent and agree, for themselves, their successors or assigns, to be and become bound thereby.

In Witness Whereof, the respective parties to this Agreement and Amendment to Declaration of Trust have

(Petitioners' Exhibit No. 1)

hereunto caused their names and seal to be affixed by their proper officers thereunto duly authorized, this the day and year first above written.

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES

As Trustee under its Trust No. 5873

By
Carl P. Smith, Vice President

By
C. M. MacFarlane, Assistant Trust Officer
PARTY OF THE FIRST PART.

FARM HOME BUILDERS, INCORPORATED

By F. D. HALL

President

By
Secretary

PARTY OF THE SECOND PART.

PAN AMERICAN BANK OF CALIFORNIA
in Liquidation

By John McFaul

John McFaul, Special Deputy Superintendent
of Banks

FIRST PAYEE

PARTY OF THE THIRD PART.

F. D. HALL

F. D. Hall

M. S. HALL

M. S. Hall

(Petitioners' Exhibit No. 1)

TRUST 5873

Exhibit "A"

SCHEDULE OF AMENDED RELEASE PRICES

Tracts in Sections 7, 8, 17, 18, T. 6 N., R. 13 W.,
SBB & M.

		Acreage or	Amended
		Frontage	Release
			Price
Tract 1	a	60'	\$ 36.00
	b	"	36.00
	c	"	50.00
	d	"	30.00
	e	"	30.00
	f	"	30.00
	g	"	30.00
	h	"	30.00
Tract 2	d	"	56.00
	e	"	66.00
	f	"	75.00
	g	"	84.00
	h	"	95.00
	i	"	105.00
	j	"	30.00
	k	"	30.00
	l	2	30.00
	m	"	30.00
	n	"	30.00
	o	"	30.00
	q	50'	38.00
	r	"	39.00
	s	"	41.00

(Petitioners' Exhibit No. 1)

		<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract	3	c	60'	140.00
		e	"	200.00
		f	"	20.00
		g	"	20.00
		h	"	20.00
		i	"	20.00
		j	2	30.00
Tract	4	b	100' short	60.00
		d	"	200.00
		g	75'	150.00
Tract	5	Out		
Tract	6	Out		
Tract	7	a	2.53 a.	250.00
		b	2.48	250.00
		c	"	250.00
		d	"	250.00
Tract	8	Out		
Tract	9	Out		
Tract	10	a	2.53 a.	150.00
		b	2.48	150.00
		c	2.48	150.00
		d	2.48	150.00
Tract	11	a	2.53	150.00
		b	2.48	150.00
		c	2.48	150.00
		d	2.48	150.00
Tract	12	Out		

(Petitioners' Exhibit No. 1)

Trust 5873 Page 2 Schedule of Amended Release Prices

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 13	a	2.48 a	\$ 200
	b	"	"
	c	.98	"
	d	"	120.
	e	"	"
	f	"	"
	g	1.07	"
Tract 14	a	1.41	150
	e	1.08	82
	g	.96	120
	h	1.34	158
Tract 15	Out		
Tract 16	a	2.50 a.	200
	b	"	"
	c	1.24	120
	d	1.25	120
	e	1.26	150
	f	1.25	150
Tract 17	a	2.54 a	150
	b	1.10	150
	c	1.33	150
	d	1.25	100
	e	1.26	100
	f	1.36	150
	g	1.17	150
Tract 18	a	2.54 a	30
	b	2.54	50
	d	2.54	30
	e	2.42	120
	f	2.42	120

(Petitioners' Exhibit No. 1)

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 19	a	2.54	20
	b	2.54	20
	c	2.54	20
	d	2.54	20
	e	2.42	100
	f	2.42	100
Tract 20	a	2.54	20
	b	2.54	20
	c	2.54	20
	d	2.54	20
	e	1.98	80
	f	2.34	100
Tract 21	a	2.54	20
	b	2.54	20
	c	3.81	100
	d	3.15	100
Tract 22	a	2.53	20
	b	2.56	20
	c	2.56	20
	d	2.64	80
	e	2.41	80
	f	2.30	80
Tract 23	Out		
Tract 24	a	2.54 a	100
	b	2.49	100
	d	2.64	100
Tract 25	c	2.49	100
	d	2.49	100
Tract 26	a	2.54	100
	b	2.49	100
	c	2.49	100

(Petitioners' Exhibit No. 1)

Trust 5873 Page 3 Schedule of Amended Release Prices

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 26			
	cont'd-d	2.49	\$ 100
Tract 27	Out		
Tract 28	a	2.54 a	100
	c	2.49	100
	d	2.49	100
Tract 29	Home Place	30 a.	4,000
Tract 30	None		
Tract 31	Home Place	20 a.	600
Tract 32	a	2.39	100
	c	2.61	100
	d	2.39	100
	w.	9.93	200
Tract 33	b	2.80 a.	120
	c	2.80	120
Tract 34	a	2.17	100
	b	2.17	100
	c	2.17	100
Tract 35	Out		
Tract 36		8.74 a.	400
Tract 37	Out	6.63 a. lake	
Tract 38	Out		
Tract 39	a	2.17 a.	100
	b	2.17	100
	c	2.17	100
	d	2.19	100
Tract 40	a	2. a	80
	b	4.47	200
	c	2.17	80

(Petitioners' Exhibit No. 1)

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 41	a	3. a	80
	c	2.74	80
	d	2.69	80
Tract 42	a	2.52	100
	b	2.49	100
	c	2.49	100
	d	2.49	100
Tract 43	a	3.06	120
	b	.82	40
	d	1. a	100
	e	2.40	100
	f	2.18	100
Tract 44	a-1	1.09	20
	b-1	.98	40
	c	1.08	40
	d-1	9.84	250
	e	1.04	40
	f-1	.86	40
	g-1	1. a	50
Tract 45	Out		
Tract 46	Out		
Tract 47	a	2.09 a	100
	b	1.72	100
	c	2.00	100
	d	1.10	100
	e	1.10	100
	f	2.04	150
	g	2.15	150
	h	1.08	80
	i	1.30	120

(Petitioners' Exhibit No. 1)

Trust 5873 Page 4 Schedule of Amended Release Prices

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 48	a	1.73	200
	b	1.49	150
	c	1.33	100
	d	1.83	100
	e-1	2.87	150
	f	2.60	80
	g	2.62	100
	h	2.30	150
Tract 49	a	1.61 a.	200
	b	1.90	200
	c	1.81	200
	d	1.55	200
	e	1.98	60
	f	2.04	60
	g	2.30	60
	h	2.63	60
Tract 50	a	.93	40
	b	1.00	40
	c	.86	50
	d	1.54	20
	e	1.68	20
	f	.82	20
	g	1.23	60
	h	1.00	40
Tract 51	e	50'	20
	f	50'	20
	g	50'	20
	h	50'	20
	i	50'	20

(Petitioners' Exhibit No. 1)

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 52	a	2.52 a	70
	b	2.49	70
	c	2.49	70
Tract 53	a	3.49	60
	c	2.72	60
	d	2.72	60
Tract 54	c	2.68	40
	d	2.68	40
	e	2.63	40
Tract 55	Out		
Tract 56	b	2.95	30
	c	2.91	30
	e	5.42	30
	f	2.65	60
	g	2.83	80
Tract 57	c	2.60	100
	d	2.60	100
Tract 58	Out		
Tract 59	c	2.49 a.	100
	d	2.49	100
Tract 60	a	2.52	100
	b	2.49	100
	c	2.49	100
	d	2.49	100
Tract 61	a	3.04	120
	b	.86	40
	c	.86	40
	d	.98	50
	e	2.10	100
	f	2.18	100

(Petitioners' Exhibit No. 1)

Trust 5873 Page 5 Schedule of Amended Release Prices

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 62	a	1.70 a.	60
	b	1.70	60
	c	1.70	60
	d	50'	20
	e	50'	20
	f	50'	20
	g	50'	20
	h	50'	20
	i	50'	20
Tract 63	a	1.15 a.	50
	b	2.36	100
	c	2.36	100
	d	2.36	100
	e	.88	40
	f	.86	40
Tract 64	a	.93	40
	b	2.40	80
	c	2.40	80
	d	2.40	80
	e	.91	40
	f	1.04	40
Tract 65	a	2.23	100
	b	1.76	80
	c	1.77	80
	d	2.73	60
	e	2.79	60
	f	2.88	60
	g	2.98	60
Tract 66	a	1.71	80

(Petitioners' Exhibit No. 1)

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
	b	1.67	80
	c	1.54	80
	d	1.33	80
	e	2.92	60
	f	2.84	60
	g	2.83	60
	h	2.81	60
Tract 67	a	1.20	60
	b	1.26	60
	c	1.32	60
	d	2.25	60
	e	2.40	60
	f	2.55	60
Tract 68	a	1.50	70
	b	1.50	70
	c	1.51	70
	d	2.17	60
	e	2.29	60
	f	2.42	60
Tract 69	a	1.55	70
	b	1.55	70
	d	1.84	40
	e	1.86	40
	f	1.99	40
Tract 70	a	1.59	200
	b	1.64	200
	c	1.64	200
	d	1.57	200
	e	2.74	50
	f	2.73	50
	g	2.76	50
	h	2.86	50

(Petitioners' Exhibit No. 1)

Trust 5873 Page 6 Schedule of Amended Release Prices

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 71	a	1.80	\$ 200.
	b	1.63	200
	c	1.54	200
	d	1.48	200
	e	2.95	50
	f	3.01	50
	g	3.15	50
	h	3.01	50
Tract 72	a	1.82	200
	b	1.82	200
	c	1.82	200
	d	1.82	200
	e	3.06	50
	f	3.13	50
	g	3.21	50
	h	3.29	50
Tract 73	a	1.77	150
	b	1.58	150
	c	1.77	150
	d	1.49	150
	e	1.54	150
	f	2.86	50
	g	2.99	50
	h	5.67	70
Tract 74	a	4.08	100
	b	4.08	100
	c	4.08	100
	d	4.08	100
	e	7.60	150

(Petitioners' Exhibit No. 1)

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 75	a	4.04	100
	b	4.05	150
	c	4.05	100
	d	5.08	100
Tract 76	a	3.63	50
	b	3.69	50
	c	3.75	50
	d	3.81	50
	e	3.88	50
	f	3.95	50
	g	4.03	50
	h	6.10	70
Tract 77	a	50'	40
	b	50'	40
	c	50'	40
	d	50'	40
	e	50'	40
	f	50'	40
	g	50'	40
	h	50'	40
	i	50'	40
	j	1.80 a	120
	k	3.09	250
	l	3.26	250
	m	3.32	200
	n	3.38	150
	o	3.44	150
	p	3.49	150
	r Out		
Tract 78		50'	40
Tract 79	Out		

(Petitioners' Exhibit No. 1)

Trust 5873 Page 7 Schedule of Amended Release Prices

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 80	a	3.22 a	\$ 100
	b	3.31	150
	c	2.92	200
	d	2.53	200
	e	3.47	150
	f	3.41	100
	g	3.35	100
	h	3.29	100
	i	3.23	100
Tract 81	a	1.79	100
	b	3.92	120
	c	6.17	120
	d	8.43	120
Tract 82	a	10.66	150
	b	11.66	150
	c	11.45	120
	d	11.07	120
	e	10.68	100
Tract 83	a	3.17	80
	b	3.11	80
	c	3.05	80
	d	2.99	80
	e	2.93	80
	f	2.87	80
	g	2.81	80
	h	4.15	80
Tract 84	a	10.30	100
	b	9.92	100
	c	9.53	120
	e	8.76	150

(Petitioners' Exhibit No. 1)

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Tract 85	a	8.38	80
	b	8.02	80
	c	7.65	80
	d	7.28	100
	e	6.91	120
	f	6.54	80
Tract 86	a	2.67	150
	b	2.61	150
	c	2.55	80
	d	2.83	80
Tract 87	a	2.45	80
	b	2.39	80
	c	2.33	80
	g	3.02	120
Tract 88	a	6.14	60
	b	5.77	80
	c	5.40	100
	d	5.03	140
Tract 89	a	4.27	140
	b	3.90	120
	c	6.41	200
Section 1	6 N 14 W	N 1/2 - 320 a.	1200
		S 1/2 - 320 a.	4000
Section 2			
	S W 1/4 N.E. of Highway	90 acres	1000
	S.W. of Highway	70 acres	1000
Section 2			
	S.W. 1/4 of SE 1/4 Lots U	20 acres	600
	" " " V	20 acres	600

(Petitioners' Exhibit No. 1)

	<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
Section 11	Lot a	10 a	400
	b	10 a	400
	c	10	400
	d	10	400
	e	20	600
Trust 5873	Page 8	Schedule of Amended Release Prices	
Tract			
Section 11	f	20	\$ 500
cont'd.	g	20	200
	h	20	600
	i	20	500
	j	20	400
Section 12	6 N. 14 W.		
	a	10	400
	b	10	300
	c	10	120
	d	20	500
	e	60	600
	f	10	200
	g	10	100
	h	10	400
	i	10	300
	j	10	200
	k	10	200
	l	10	200
	m	20	200

(Petitioners' Exhibit No. 1)

<u>Lot</u>	<u>Acreage or Frontage</u>	<u>Amended Release Price</u>
n	20	150
o	20	150
p	20	200
q	20	250
r	20	300
s	10	250
t	10	400
u	40	600
v	40	600
w	40	600
x	20	300
y	20	300
Section 13, 6 N. 14 W		
Portion of Lot g 27-1/2 a.		100
Section 13, Lot G		
c	2.49	30
e	9.98	50
Section 13, Lot H		
a	2.44	30
c	2.56	30
d	2.56	30
e	2.50	20
f	2.50	20
Total		

(Petitioners' Exhibit No. 1)

EXHIBIT "F"

ASSIGNMENT OF BENEFICIAL INTEREST

No. 1235

For Value Received, We, Pan American Bank of California, a Corporation in Liquidation, by John McFaul, Special Deputy Superintendent of Banks, do hereby assign, transfer and set over unto Pacific States Corporation, a corporation, all its interest in and to the Trust evidenced by that certain Declaration of Trust dated Dec. 2, 1929 and issued by the Citizens Trust and Savings Bank, a corporation and/or Citizens National Trust & Savings Bank of Los Angeles, a national banking association under its Trust No. 5902 together with a like interest in and to the net proceeds and avails arising or growing out of the said Trust, and said Trustee is hereby authorized to pay and turn over unto said Assignee all moneys and benefits growing out of the said interest hereby assigned and to consider said Assignee a Beneficiary under said Trust to the extent of said interest.

This Assignment is made, however, subject to all of the terms and conditions of said Declaration of Trust.

Dated November 2nd, 1939.

PAN AMERICAN BANK OF CALIFORNIA
a corporation in Liquidation

(Seal) By JOHN McFAUL

John McFaul

J McF

Special Deputy Superintendent of Banks

(Acknowledged 11/2/1939)

(Petitioners' Exhibit No. 1)

ASSIGNEE'S ACCEPTANCE

We, Pacific States Corporation, a Corporation, do hereby accept the above Assignment to the interest above set out in and to said Trust No. 5902, and do also hereby agree to and do approve, ratify and confirm said Declaration of Trust and all amendments thereto in all particulars.

Dated Nov. 3, 1939

PACIFIC STATES CORPORATION

(Seal)

By HULETT C. MERRITT

President

By C. H. DICKINSON

Secretary

TRUSTEE'S ENDORSEMENT

The original of this Assignment filed in the Trust Department of the Citizens National Trust & Savings Bank of Los Angeles, this 10th day of November, 1939.

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES

By FRANK A. FORD

Assistant Trust Officer

(Petitioners' Exhibit No. 1)

EXHIBIT "G"

No. 1236

ASSIGNMENT OF FIRST PAYEE'S INTEREST

For Value Received, We, Pan American Bank of California, a Corporation in Liquidation, by John McFaul, Special Deputy Superintendent of Banks, do hereby assign, transfer and set over unto Pacific States Corporation, a corporation, all of its First Payee's, as party of the third part, Interest in and to the Trust evidenced by that certain Declaration of Trust dated Dec. 2, 1929 and issued by the Citizens Trust and Savings Bank, a corporation and/or Citizens National Trust & Savings Bank of Los Angeles, a national banking association under its Trust No. 5873 together with a like interest in and to the net proceeds and avails arising or growing out of the said Trust, and said Trustee is hereby authorized to pay and turn over unto said Assignee all moneys and benefits growing out of the said Interest hereby assigned and to consider said Assignee a Payee under said Trust to the extent of said Interest.

This Assignment is made, however, subject to all of the terms and conditions of said Declaration of Trust.

Dated November 2nd, 1939.

PAN AMERICAN BANK OF CALIFORNIA
a Corporation in Liquidation

(Seal) By JOHN McFAUL

John McFaul

J McF

Special Deputy Superintendent of Banks

(Acknowledged 11/2/1939)

(Petitioners' Exhibit No. 1)

ASSIGNEE'S ACCEPTANCE

We, Pacific States Corporation, a corporation, do hereby accept the above Assignment to the interest above set out in and to said Trust No. 5873, and to also hereby agree to and do approve, ratify and confirm said Declaration of Trust and all amendments thereto in all particulars.

Dated Nov. 3, 1939

PACIFIC STATES CORPORATION

(Seal)

By HULETT C. MERRITT

President

By C. H. DICKINSON

Secretary

TRUSTEE'S ENDORSEMENT

The original of this Assignment filed in the Trust Department of the Citizens National Trust & Savings Bank of Los Angeles, this 10th day of November, 1939.

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES

By FRANK A. FORD

Assistant Trust Officer

(Petitioners' Exhibit No. 1)

EXHIBIT "H"

NOTICE OF BREACH OF OBLIGATION AND OF ELECTION TO SELL TRUST PROPERTY

To Whomsoever It May Concern:

Notice is hereby given, that, whereas default, as hereinafter more particularly set forth, has occurred in the performance of certain conditions and obligations of a certain Declaration of Trust dated December 2, 1929, executed by Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, as Trustee and Party of the First Part; Farm Home Builders, Incorporated, a Corporation, Trustor and/or Beneficiary, Party of the Second Part; Pan American Bank of California, a Corporation, First Payee, Party of the Third Part, and Phillips & Hambaugh Realty & Construction Company, a Corporation, Second Payee, Party of the Fourth Part; said Declaration of Trust being designated in the files of said Trustee as Trust No. 5873; and

Whereas, said Declaration of Trust provides, among other things, that the Trustor caused to be conveyed to Trustee in trust with power of sale certain real property situate in the County of Los Angeles, State of California, the property so conveyed being described in that deed dated January 7, 1930, executed by the Pan American Bank of California, a Corporation, in favor of Citizens National Trust & Savings Bank of Los Angeles, recorded January 17, 1930, in Book 9691 at Page 133 of Official Records of said County, which property, except those portions thereof heretofore conveyed by said Trustee, by the

(Petitioners' Exhibit No. 1)

deeds described in Exhibit A attached hereto, now forms the remaining corpus of said Trust; and

Whereas, said Declaration of Trust also provides that Trustor caused to be transferred and assigned to Trustee in trust with power of sale certain Agreements of Sale of Real Estate covering portions of said property; for all particulars relative to those of said Agreements of Sale of Real Estate now remaining outstanding and unpaid, and to similar Agreements of Sale subsequently executed by said Trustee and now constituting a portion of the trust estate held by said Trustee under said Declaration of Trust, reference is made to the files and records of said Trustee; and

Whereas, by the terms and provisions of said Declaration of Trust, it is further provided that said trust was created, among other things, to secure the payment of the indebtedness of the Trustor therein to Pan American Bank of California, a Corporation, therein designated as First Payee and Party of the Third Part, in the sum of \$45,000.00, together with interest thereon and/or any renewal or renewals and/or extensions thereof; and to secure to the Trustee payment of all fees, commissions and advancements made under the terms thereof; also that it shall be the duty of Beneficiary to proceed with all diligence to sell the unsold portions of the trust property upon the terms and conditions therein provided, and that said Beneficiary covenants and agrees to deposit with Trustee all sums necessary for the payment of items shown in Article III of said Declaration of Trust, said items including, among others, payment of taxes, assess-

(Petitioners' Exhibit No. 1)

ments and other liens or encumbrances upon the trust property; and

Whereas, the interest of said Phillips & Hambaugh Realty & Construction Company, a Corporation, as Second Payee and Party of the Fourth Part, in and under said Declaration of Trust, was heretofore and on, to-wit: the 26th day of April, 1938, fully released, satisfied and discharged, and

Whereas, the interest of said Pan American Bank of California, a Corporation, was subsequently acquired by the State Superintendent of Banks of the State of California in process of liquidation of said Bank, and was by said Superintendent of Banks on November 2, 1939, duly assigned to Pacific States Corporation, a Corporation, said last named corporation being now the owner and holder of said note and Party of the Third Part's beneficial interest in and under said Declaration of Trust, and, as such, the present First Payee under said Declaration of Trust; and

Whereas, in Article VI of said Declaration of Trust, it is further provided, among other things, that if one or more certain events, therein called events of default, shall happen, that is to say:

1. If default shall be made in the payment of interest due the Pan American Bank of California, as and when the same shall become due and payable;
2. If default shall be made in the payment of principal of the obligation due the Pan American Bank of California, as and when the same shall become due and payable; or

(Petitioners' Exhibit No. 1)

3. If default shall be made in the payment to the Trustee of any advances made by the Trustee and such default shall continue for a period of thirty days; or
4. If default shall be made in the due observance or performance of any other covenant or condition therein to be kept or performed, by the Beneficiary and/or the Trustor, and such default shall continue for a period of thirty days.

Then, and in each such case, the Trustee may, and upon the written request of the First Payee, shall, declare all obligations in favor of the Pan American Bank of California, and/or the Citizens National Trust & Savings Bank of Los Angeles, together with interest thereon, due and payable, and proceed to sell to the highest bidder, such portion, or all of the trust property, as in its discretion it may deem necessary or proper, in one or more or all of the manners and methods therein set forth; and

Whereas, default of said Trustor and/or Beneficiary, Farm Home Builders, Incorporated, a Corporation, under said Declaration of Trust, having heretofore occurred with respect to the following events:

1. Said Trustor and/or Beneficiary has failed and neglected to pay the remaining unpaid principal balance of said Trust Deed Note and obligation in the original sum of \$45,000.00, said remaining unpaid principal balance being in the sum of \$23,921.52, which matured and became due and payable on July 30, 1932;

(Petitioners' Exhibit No. 1)

2. Said Trustor and/or Beneficiary has also failed and neglected to pay the installment of interest on said Promissory Note and obligation which became due and payable on April 30, 1932, nor has any portion thereof since been paid, except the sum of \$363.85, which was applied on account of interest on August 23, 1937. No further payments of interest have been made on said obligation.
3. Trustor and/or Beneficiary has also failed and neglected to pay the regular installments of general and special State and County taxes on the property covered by said Declaration of Trust subsequent to 1931-32, save and except a payment of \$436.56 paid by said Trustee on September 27, 1938, and also a payment of \$278.97 paid by said Trustee on March 20, 1939.
4. Said Trustor and/or Beneficiary has also failed and neglected to proceed with all due diligence to sell the unsold portion of the trust property, upon the terms and conditions provided in said Declaration of Trust, as therein provided.

Now, Therefore, in accordance with the terms and provisions of said Declaration of Trust and by reason of the aforesaid events of default having heretofore occurred and having continued for a period of more than thirty (30) days, and written request and demand having been heretofore made upon Trustee by said Pacific States Corporation, as First Payee under said Declaration of Trust, to declare all obligations in favor of said First Payee,

(Petitioners' Exhibit No. 1)

as successor in interest to said Pan American Bank of California, together with interest thereon, due and payable, the undersigned Trustee, by virtue of the authority vested in it under said Declaration of Trust and more particularly in Article VI, above referred to, does now hereby declare the remaining unpaid principal of all sums due and payable upon said Promissory Note and obligations hereinabove referred to, together with interest thereon, to be immediately due and payable, and said undersigned Trustee has elected to cause this notice to be recorded in the office of the County Recorder of Los Angeles County, the Recorder of the County wherein said property is situated, and all of the property, both real and personal, constituting, as of the date hereof, the remaining corpus of said Trust and now held by said Trustee thereunder, and all of the right, title, claim, interest, and estate, both legal and equitable, of said Trustor and/or Beneficiary therein and thereto under said Declaration of Trust, or so much thereof as may be necessary, to be sold to satisfy said obligations.

Any such sale or sales, as and when made by Trustee as aforesaid, shall be made in the following manner prescribed by said Declaration of Trust, namely:

1. In the event of default and the election of the Trustee to sell, and/or upon the receipt of Declaration of Default and Demand for Sale, as hereinbefore provided, the Trustee, shall, without unnecessary delay, record in the Office of the Recorder of Los Angeles County, a notice of such breach and of the election to cause said property to be sold to satisfy said obligation. The ac-

(Petitioners' Exhibit No. 1)

ceptance of any sum or sums secured hereby, principal or interest, after the same becomes due and payable, or the performance of any or all obligations herein mentioned, shall not operate as a Waiver of the right to insist upon the payment when due of all other sums secured hereby and the performance of any or all other obligations herein mentioned and to declare default and proceed with the sale under said Declaration of Trust.

2. After three months shall have elapsed following the recordation of said Notice of Breach, the Trustee without demand, shall sell said property in such parcels and at such times and places as it shall deem best to accomplish the objects of these Trusts, having first given notice of the time and place of such sale or sales, in the manner and for a time not less than that required by law for sales of real property upon the execution and under Deeds of Trust.

3. The Trustee may from time to time postpone the sale of all or any portion of said property by the publication, prior to the date of sale so advertised, of a notice of postponement in the same newspaper or newspapers in which the original notice of sale was published, or by public announcement thereof at the time and place of sale so advertised or postponed.

At the time and place of sale fixed as provided in said Declaration of Trust, the Trustee shall sell the property so advertised, or any portion thereof, either en masse or in separate parcels at its own discretion at public auction, to the highest and best bidder for cash, in gold coin of the United States, and after any such sale and due payment made, shall execute and deliver to the pur-

(Petitioners' Exhibit No. 1)

chaser or purchasers, a Deed or Deeds or other appropriate instruments conveying the property so sold to such purchaser or purchasers, but without covenant or warranty, express or implied, regarding the title or encumbrances, whereupon such purchaser or purchasers shall be let into immediate possession of said property, and all other persons in possession thereof shall be deemed to be tenants at sufferance and the recitals, in any such Deed, of any facts or matters affecting the regularity or validity of such sale, shall be conclusive proof of the truthfulness of such recitals, and such Deed shall be conclusive against all persons as to all matters therein recited. The Trustee, as well as the Beneficiary or any representative, heir or successor, as well as any other person or party, or any person acting on behalf of either or all or any of them, may purchase at such sale. The purchaser under such foreclosure sale shall be entitled to and shall receive the following and only the following:

- (a) Title to all lots not previously deeded and not sold under contract at the date of the Declaration of Default.
- (b) The proceeds which would have accrued to the benefit of said Trust and to the Beneficiary thereunder, in the event that there had been no default in any of the terms of said Declaration of Trust, arising from all lots and parcels of real estate sold thereunder. Provided, however, that in the event of the release of the contract lien on any lot or parcel of real estate (1) by cancellation of the contract, other than cancellation for the purpose of issuing Deed, or: (2) by suit to quiet title, the

(Petitioners' Exhibit No. 1)

title to said lot shall vest as in (a) supra by issuance of conveyance running from the Trustee hereunder to the purchaser under said Foreclosure Sale.

In Witness Whereof. said Citizens National Trust & Savings Bank of Los Angeles has this 3rd day of July, 1940, hereunto caused its name and seal to be affixed by its Vice President and Assistant Trust Officer thereunto duly authorized.

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES as Trustee
under said Declaration of Trust No. 5873

By CARL P. SMITH

Seal

Vice President

By FRANK A. FORD

Assistant Trust Officer

State of California, County of Los Angeles—ss.

On this 3rd day of July, 1940, before me, the undersigned, a Notary Public in and for said County, personally appeared Carl P. Smith, known to me to be the Vice President, and Frank A. Ford, known to me to be the Assistant Trust Officer of the Citizens National Trust & Savings Bank of Los Angeles, the National Banking Association that executed the within and foregoing instrument, as Trustee under its Declaration of Trust No. 5873, and known to me to be the persons who executed the within instrument on behalf of the Association therein named and acknowledged to me that such Association executed the same as said Trustee.

(Petitioners' Exhibit No. 1)

Witness my hand and official seal the day and year in this certificate first above written.

Notary Public in and for the County of Los Angeles,
State of California.

Exhibit "A"

FARM HOME BUILDERS—TRUST 5873

Tract 5148 and Acreage

Recording References of Deed Conveyances Heretofore
Executed by Citizens National Trust & Savings
Bank of Los Angeles, as of June 30, 1940, as Per
Official Records of Los Angeles County

Deed No.	Lot No.	Recording No.	Date of Recording	Book	Page
*1	Pt. 4	see below			
2	" H	550	7/23/30	10188	88
3	" H	601	6/25/30	10102	144
4	" 14	1120	3/ 6/31	10750	45
*5	" 24	see below			
6	" 54	739	6/ 3/33	12209	149
7	" 58	1152	9/ 4/31	11155	31
8	" 2	614	4/ 8/32	11572	20
9	" 59	817	9/ 1/31	11128	67
10	" 14	1241	8/20/31	11033	352
11	" 4	738	1/20/33	12042	23
12	" 57	447	10/ 7/31	11094	389
13	" 3	460	10/27/31	11231	100
14	" 33	493	10/24/31	11180	231

(Petitioners' Exhibit No. 1)

Tract 5148 and Acreage

Deed No.	Lot No.	Recording No.	Date of Recording	Book	Page
15	" 51	1169	3/ 2/32	11421	247
16	" 84	504	8/16/32	11739	167
17	" 25	961	3/ 5/34	12668	101
18	" 4	287	10/25/32	11854	183
19	" 27	962	3/ 5/34	12692	37
20	" 56	938	5/ 2/33	12180	75
21	" 51	1059	6/21/34	12870	76
22	("B" (Blk. G	559	7/18/33	12317	46
23	Pt. 34	754	8/11/33	12359	34
24	79	915	10/13/33	12409	144
25	"A" Blk. G	323	8/26/33	12335	200
26	Pt. 43	530	9/22/33	12354	223
27	" 41 & 53	293	11/18/33	12470	203
28	" 57	790	4/11/34	12724	136
*29	" 54	see below			
30	" 25	520	6/ 8/34	12738	359
31	" 27	625	4/21/36	14054	268
32	" 52	1453	10/23/34	12982	307
33	" 58	1083	6/26/36	14189	268
34	" 88	134	9/25/35	13678	109
35	" 27	646	8/26/35	13594	180
36	" 32	852	11/12/37	15464	15
37	" 87	1066	3/29/38	15684	140
*38	" 77	see below			
*39	" 56	see below			
40	" 77	1407	9/16/38	16023	274
41	" 77	241	12/ 2/38	16272	73
43	" 74 & 87	793	1/ 3/39	16340	50

(Petitioners' Exhibit No. 1)

Tract 5148 and Acreage

Deed No.	Lot No.	Recording No.	Date of Recording	Book	Page
44	" 83	462	3/11/39	16440	202
45	" 60	430	9/28/39	16893	94
46	" 3	828	12/ 5/39	17115	118
47	" 89	1104	11/17/39	17102	30
48	" SW 1/4	523	12/15/39	17153	82

Sec. 2,

Tp.6N.R.14W.

*Also the Following Parcels of Property Heretofore
Conveyed by Unrecorded Deeds of Conveyance,
viz:

1. The West 200 feet of the East 500 feet of Lot 4, Tract 5148, in the County of Los Angeles, State of California, as per map recorded in Book 56, Page 78 of Maps, Records of said County; said distances being measured along the North line of said Lot 4.
- 5 The South 169 feet of the North 510.56 feet of Lot 24, Tract 5148, County of Los Angeles, State of California, as per map recorded in Book 56, Page 78 of Maps, Records of said County; said distances being measured along the West line of said Lot 24.
- 29 Parcel 1. Lot 54, Tract 5148, County of Los Angeles, State of California, as per map recorded in Book 104, Page 77 of Maps, records of said County. Except from said Lot 54 the North 710.44 feet thereof, said distance being measured along the West line of said Lot 54.

(Petitioners' Exhibit No. 1)

Deed

No.

Parcel 2. An easement for road purposes over those portions of said Lot 54 and of Lot 53, Tract 5148, as per map recorded in Book 61, Page 57 of Maps, records of said County, lying within the lines of a strip of land 40 feet in width, the center line of which is described as follows:

Beginning at the North West corner of said Lot 53; thence South $0^{\circ} 35'$ East, along the West line of said Lot 53, 600.00 feet.

- 38 That portion of Lot 77, Tract 5148, County of Los Angeles, State of California, as per map recorded in Book 104, Page 78 of Maps, records of said County, described as follows:

Beginning at the South West corner of Lot 78, said Tract 5148; thence North $66^{\circ} 40' 41''$ West, along the South Westerly line of said Lot 77, 152.81 feet; thence North $3^{\circ} 25' 40''$ West, parallel with the West line and the North prolongation thereof, of said Lot 78, 440 feet to the true point of beginning; thence North $3^{\circ} 25' 40''$ West, along said parallel line, 80 feet; thence South $66^{\circ} 40' 01''$ East, parallel with said South Westerly line, 312.81 feet to the East line of said Lot 77; thence south $3^{\circ} 25' 40''$ East, along said East line, 80 feet; thence North $66^{\circ} 40' 01''$ West, parallel with said South Westerly line, 312.81 feet to the true point of beginning.

- 39 Parcel 1. That portion of Lot 56, Tract 5148, County of Los Angeles, State of California, as per map recorded in Book 104, Page 77 of Maps, records of said County, lying West of the South prolongation of a line parallel with and distant 40

(Petitioners' Exhibit No. 1)

feet East of the West line of Lot 63, said Tract 5148.

Except from the above described property the West 367.24 feet and the North 204 feet thereof.

Reserving an easement for road purposes over the North 40 feet of the above described property.

Parcel 2. An easement for road purposes over those portions of Lots 56, 57, 58 and 63, said Tract 5148, lying within the lines of a strip of land 40 feet in width, the West line of which is described as follows:

Beginning at the North West corner of said Lot 63, thence South $0^{\circ} 35'$ East, along the West line and the South prolongation thereof, of said Lot 63 to a point 204 feet South of the North line of said Lot 56.

EXHIBIT "I"

NOTICE OF TRUSTEE'S SALE

Whereas, on the 2nd day of December, 1929, Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, as Trustee, made and entered into a certain Declaration of Trust designated in the files of said Trustee as Trust No. 5873, wherein said Citizens National Trust & Savings Bank of Los Angeles is designated as Trustee and Party of the First part; Farm Home Builders, Incorporated, a corporation, Trustor and/or Beneficiary, Party of the Second Part, Pan-American Bank of California, a corporation, First Payee, Party of the Third Part, and Phillips & Hambaugh Realty & Con-

(Petitioners' Exhibit No. 1)

struction Company, a corporation, Second Payee, Party of the Fourth Part;

Whereas, in said Declaration of Trust, it is provided, among other things that the Trustor had caused to be conveyed to Trustee in trust with power of sale certain real property situated in the County of Los Angeles, State of California, the property so conveyed being described in that deed dated January 7, 1930, executed by the Pan-American Bank of California in favor of Citizens National Trust & Savings Bank of Los Angeles, and recorded January 17, 1930, in Book 9691 at Page 133 of Official Records of said county, which property, except those portions thereof heretofore conveyed by said Trustee by certain deeds and instruments of conveyance more particularly described and referred to in Exhibit "A" of that certain Notice of Breach of Obligation and of Election to Sell Trust Property hereinafter more particularly referred to, and by instruments of conveyance executed by said Trustee subsequent to the date of execution and recordation of said Notice of Breach, now constitutes the remaining corpus of said Trust;

Whereas, said declaration of Trust also provided that the Trustor caused to be transferred and assigned to Trustee in trust with power of sale certain Agreements of Sale of Real Estate covering portions of said real property, for all particulars relative to those of said Agreements of Sale of Real Estate now remaining outstanding and unpaid, and to similar Agreements of Sale subsequently executed by said Trustee under said Declaration of Trust, reference is made to the files and records of said Trustee, and

(Petitioners' Exhibit No. 1)

Whereas, said Declaration of Trust further provided that said Trust was created, among other things, to secure the payment of the indebtedness of the Trustor therein to Pan-American Bank of California, a corporation, therein designated as First Payee and Party of the Third Part, in the sum of \$45,000.00, together with interest thereon and/or any renewal or renewals and/or extensions thereof; and to secure to the Trustee payment of all fees, commissions and advancements made under the terms thereof; also that it should be the duty of Beneficiary to proceed with all diligence to sell the unsold portion of the trust property upon the terms and conditions therein provided, and that said Beneficiary agreed to deposit with Trustee all sums necessary for the payment of items shown in Article III of said Declaration of Trust, said items including, among others, payment of taxes, assessments and other liens or encumbrances upon the trust property; and

Whereas, the interest of said Phillips & Hambaugh Realty & Construction Company, a corporation, as Second Payee and Party of the Fourth Part, in and under said Declaration of Trust, was heretofore and on, to-wit: the 26th day of April, 1938, fully released, satisfied and discharged, and

Whereas, the interest of said Pan-American Bank of California, a corporation, was subsequently acquired by the State Superintendent of Banks of the State of California in process of liquidation of said Bank, and was by said Superintendent of Banks on November 2, 1939, duly assigned to Pacific States Corporation, a corporation, said last named corporation being now the owner and holder of said note and Party of the Third Part's beneficial in-

(Petitioners' Exhibit No. 1)

terest in and under said Declaration of Trust, and, as such, the present First Payee under said Declaration of Trust; and

Whereas, Article VI of said Declaration of Trust further provided, among other things, that if one or more certain events, therein called events of default, should happen, that is to say: (1) If default shall be made in the payment of interest due the Pan-American Bank of California, as and when the same shall become due and payable; (2) If default shall be made in the payment of principal of the obligation due the Pan-American Bank of California, as and when the same shall become due and payable; or (3) If default shall be made in the payment to the Trustee of any advances made by the Trustee and such default shall continue for a period of thirty days; or (4) If default shall be made in the due observance or performance of any other covenant or condition therein to be kept or performed, by the Beneficiary and/or Trustor, and such default shall continue for a period of thirty days, then, and in each such case, the Trustee may, and upon the written request of the First Payee, shall, declare all obligations in favor of the Pan-American Bank of California, and/or the Citizens National Trust & Savings Bank of Los Angeles, together with interest thereon, due and payable, and proceed to sell to the highest bidder, such portion, or all of the trust property, as in its discretion it may deem necessary or proper in the manner therein and in the Notice of Breach and Election hereinafter referred to contained and set forth; and

Whereas, default of said Trustor and/or Beneficiary, Farm Home Builders, Incorporated, a corporation, under

(Petitioners' Exhibit No. 1)

said Declaration of Trust, having heretofore occurred with respect to the following events, to-wit: (1) Said Trustor and/or Beneficiary has failed and neglected to pay the remaining unpaid principal balance of said obligation in the original sum of \$45,000.00, said remaining unpaid principal balance being in the sum of \$23,921.52, which matured and became due and payable on July 30, 1932; (2) Said Trustor and/or Beneficiary has also failed and neglected to pay the installment of interest on said promissory note and obligation which became due and payable on April 30, 1932, nor has any portion thereof since been paid, except the sum of \$363.85 which was applied on account of interest on August 23, 1937. No further payments of interest have been made on said obligation; (3) Trustor and/or Beneficiary also failed and neglected to pay the regular installments of general and special State and County taxes on the property covered by said Declaration of Trust subsequent to 1931-32, save and except a payment of \$436.56 paid by said Trustee on September 27, 1938, and also a payment of \$278.97 paid by said Trustee on March 20, 1939; (4) Said Trustor and/or Beneficiary also failed and neglected to proceed with all due diligence to sell the unsold portion of the trust property, upon the terms and conditions provided in said Declaration of Trust, as therein provided; and

Whereas, the aforesaid events of default having occurred and having continued for a period of more than thirty days, and written request and demand having been made upon Trustee by said Pacific States Corporation, as First Payee under said Declaration of Trust, to declare all obligations in favor of said First Payee, as successor in interest

(Petitioners' Exhibit No. 1)

to said Pan-American Bank of California, together with interest thereon, due and payable, the undersigned, Citizens National Trust & Savings Bank of Los Angeles, as Trustee in and under said Declaration of Trust, in accordance with its terms and provisions and by virtue of the authority vested in it therein, did, on the Third day of July, 1940, declare the remaining unpaid principal due upon said promissory note and the obligations hereinabove referred to, together with interest thereon, to be immediately due and payable, and there after on the Third day of July, 1940, did cause to be recorded in the Office of the County Recorder of Los Angeles County a Notice of Breach of Obligation and of Election to Sell Trust Property in Book 17652 at Page 135 of Official Records of said County; and

Whereas, the aforementioned events of default having heretofore occurred and still continuing to exist notwithstanding written notice and demand having heretofore been made upon said Trustor and/or Beneficiary for the payment of the amounts due and payable under said Trust, and the performance of the obligations therein assumed and to be kept and performed by said Trustor and/or Beneficiary, and more than three months having elapsed subsequent to the recordation of said Notice of Breach of Obligation and of Election to Sell Trust Property as heretofore set forth;

Now, therefore, notice is hereby given by the undersigned, Citizens National Trust & Savings Bank of Los Angeles, that in accordance with the terms and provisions of said Declaration of Trust and by virtue of the authority therein vested in it as Trustee, it will offer for sale

(Petitioners' Exhibit No. 1)

and sell at public auction to the highest and best bidder, for cash payable in lawful money of the United States of America, at the Eastern entrance to the Hall of Justice, in the city of Los Angeles, County of Los Angeles, State of California, on Wednesday, the 13th day of November, 1940 at the hour of Eleven (11:00) o'clock A. M. of said day, all right, title, estate and interest now held by and vested in it as such Trustee in and to the following described real and personal property situated in the County of Los Angeles, State of California, subject, however, to all of the terms and conditions of said Declaration of Trust pertaining to the retention of title to the parcels of said real property covered by then outstanding Contracts and Agreements of Sale. At the time and place of said sale, the purchaser shall be entitled to and shall receive the following, and only the following: (a) Title to all lots and parcels of real property not previously deeded and not sold under Contracts and Agreements of Sale at the date of said sale: (b) The proceeds arriving from all lots and parcels of real property to be sold which would have accrued to the benefit of said Trust and to the Trustor and/or Beneficiary thereunder in the event that no default had occurred under the terms of said Declaration. Provided, however, that in the event of the release of the contract lien on any lot or parcel of real estate, either (1) by cancellation of the Contract other than cancellation for purpose of issuing Deed, or (2) by suit to quiet title, the title to said lot or parcel shall vest as in paragraph (a) supra, by issuance of conveyance running from said Trustee to the purchaser under said foreclosure sale. The title to any lot or parcel of real property subject to any

(Petitioners' Exhibit No. 1)

existing Contracts and Agreements of Sale executed by the Trustee prior to the time of said sale shall remain vested in the Trustee, for the sole use and benefit of the purchaser or purchasers at such sale, and the proceeds received from collections on said Contracts shall be applied by said Trustee for the benefit of said purchaser or purchasers, with the right in the Trustee to deduct from such collections its necessary expenses and the fees for such collections, as provided in Article III of said Declaration of Trust.

Description of the property is as follows:

Parcel 1: The West half of Lot 1 and all of Lots 2, 3, 4, 7, 10, 11, 13, 14, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 28 and 29 of Tract No. 5148, Sheet 1, in the County of Los Angeles, State of California, as per map recorded in Book 56, Page 78 of Maps in the office of the County Recorder of said County.

Lots 31, 32, 33, 34, 36, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52 and 53 of Tract No. 5148, Sheet 2, in said County and State, as per map recorded in Book 61, Page 57 of said Map Records.

Lots 54, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72 and 73 of Tract No. 5148, Sheet 3, in said County and State, as per map recorded in Book 104, Page 77 of said Map Records.

Lots 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88 and 89 of Tract No. 5148, Sheet 4, in said County and State, as per map recorded in Book 104, Page 78 of said Map Records.

(Petitioners' Exhibit No. 1)

Excepting from said Parcel the following described parcels of land:

(a) Those portions of said Lot 2 described as follows:

1. All of said Lot 2, except the East 684.50 feet thereof, measured along the North line of said Lot 2; also except the North 319.32 feet thereof, measured along the East line thereof.

2. The West 66 feet of the East 684.50 feet of said Lot 2, except the North 319.32 feet thereof, said distances being measured along the North and East lines of said lot.

3. The West 60 feet of the East 618.50 feet of said Lot 2, except the North 319.32 feet thereof, said distances being measured along the North and East lines of said lot.

4. The South 79.83 feet of the North 319.32 feet of said Lot 2, except the East 558.50 feet thereof, said distances being measured along the East and North lines of said Lot 2.

(b) Those portions of said Lot 3 described as follows:

1. The West 100 feet of the East 413.72 feet of said Lot 3, except the North 400 feet thereof, said distances being measured along the North and East lines of said lot.

2. The West 100 feet of the East 213.72 feet of said Lot 3, except the North 400 feet thereof, said distances being measured along the North and East lines of said lot.

3. All of said Lot 3 except the East 413.72 feet thereof, said distance being measured along the North line of

(Petitioners' Exhibit No. 1)

said lot; also except the North 400 feet thereof, said distance being measured along the East line of said lot.

4. The East 113.72 feet, measured along the Northerly line of said Lot 3, excepting therefrom the Northerly 400 feet, measured along the Easterly line of said lot.

(c) Those portions of said Lot 4 described as follows:

1. The East 150 feet of said Lot 4, said distance being measured along the North line of said lot.

2. The West 150 feet of the East 300 feet of said Lot 4, said distances being measured along the North line of said lot.

3. The West 200 feet of the East 900 feet of said Lot 4, said distances being measured along the North line of said lot.

4. All of said Lot 4 except the East 1100 feet thereof, said distances being measured along the North line of said lot.

5. The West 200 feet of the East 500 feet of said Lot 4, said distances being measured along the North line of said lot.

(d) Those portions of said Lot 14 described as follows:

1. The North 120 feet of the South 360 feet of said Lot 14.

2. The North 120 feet of the South 480 feet of said Lot 14.

3. The North 120 feet of the South 600 feet of the West 351 feet of said Lot 14.

(Petitioners' Exhibit No. 1)

4. The North 120 feet of the South 240 feet of said Lot 14.

(e) The West 441.31 feet of the East 882.62 feet of said Lot 18, excepting therefrom the South 250.50 feet thereof.

(f) Those portions of Lot 24 described as follows:

1. The South 169 feet of the North 341.56 feet of said Lot 24.

2. The South 169 feet of the North 510.56 feet of said Lot 24, said distances being measured along the West line of said lot.

(g) Those portions of Lot 25 described as follows:

1. The North 172.56 feet of said Lot 25.

2. The South 169 feet of the North 341.56 feet of said Lot 25.

(h) The South 169 feet of the North 341.56 feet of said Lot 28.

(i) That portion of said Lot 32 described as follows:

Beginning at the Northeast corner of said lot; thence South $86^{\circ} 31' 32''$ West, along the North line of said lot, 662.50 feet; thence South $0^{\circ} 35'$ East, parallel with that certain East line of said lot which has a bearing of South $0^{\circ} 35'$ East and the South prolongation thereof, 329.52 feet to the true point of beginning; thence South $0^{\circ} 35'$ East, along said parallel line 172.26 feet; thence North $86^{\circ} 31' 32''$ East, parallel with said North line 661.4 feet to the East line of said lot; thence North $0^{\circ} 03' 40''$ West along said East line, 135.68 feet to an angle point therein; thence North $0^{\circ} 35'$ West, along said East

(Petitioners' Exhibit No. 1)

line, 36.58 feet to the intersection with a line parallel with said North line and which passes through the true point of beginning; thence South $86^{\circ} 31' 32''$ West, along the last described parallel line 662.50 feet to the true point of beginning.

(j) Those portions of said Lot 33 described as follows:

1. All of said Lot 33 except the North 360 feet thereof.
2. The South 180 feet of the North 360 feet of said Lot 33.

(k) All of said Lot 34 except the South 438 feet thereof.

(l) The South 180.93 feet of the North 542.79 feet of said Lot 41.

(m) Those portions of said Lot 43 described as follows:

1. The South 200 feet of said Lot 43.
2. The North 135 feet of the South 470 feet of the East 266.02 feet of said Lot 43.

(n) Those portions of said Lot 51 described as follows:

1. The East 112.30 feet of said Lot 51, except the South 450 feet thereof, said distances being measured along the South and East lines, respectively, of said lot.
2. The South 150 feet of said Lot 51.
3. The North 150 feet of the South 300 feet of said Lot 51 and the North 150 feet of the South 450 feet of said Lot 51.

(o) All of said Lot 52, except the South 511.52 feet thereof.

(Petitioners' Exhibit No. 1)

(p) The South 180.93 feet of the North 542.79 feet of said Lot 53.

(q) Those portions of said Lot 54 described as follows:

1. All of said Lot 54 excepting therefrom the North 710.44 feet thereof, said distance being measured along the West line of said lot.

2. The South 177.61 feet of the North 710.44 feet of said Lot 54, said distances being measured along the West line of said lot.

(r) Those portions of said Lot 56 described as follows:

1. The North 204 feet of that portion of said Lot 56 lying West of a line parallel with and distant 20 feet East of the South prolongation of the West line of Lot 63 of said Tract.

2. That portion of said Lot 56 lying West of the South prolongation of a line parallel with and distant 40 feet East of the West line of Lot 63 of said Tract, excepting therefrom the West 367.24 feet and the North 204 feet thereof.

(s) Those portions of said Lot 57 described as follows:

1. The North 204 feet of that portion of said Lot 57 lying West of a line parallel with the South prolongation of the West line of Lot 63 of said tract and distant East 20 feet therefrom.

2. That portion of said Lot 57 lying West of a line parallel with and distant 20 feet East of the South prolongation of the West line of Lot 63 of said tract, excepting therefrom the North 204 feet thereof.

(Petitioners' Exhibit No. 1)

(t) The South 171.52 feet and the North 170 feet of the South 341.52 feet of said Lot 59.

(u) The South 171.52 feet and the North 170 feet of the South 341.52 feet of said Lot 60.

(v) All of said Lot 69, except the West 293.64 feet measured along the South line, lying Southerly of a line described as follows:

Beginning at a point in the West line of said lot that is distant thereon North $1^{\circ} 16' 10''$ West 417.88 feet from the Southwest corner thereof; thence South $85^{\circ} 28'$ East, 446.12 feet to a point in the East line of said lot that is distant thereon North $0^{\circ} 35'$ East 413.83 feet from the Southeast corner thereof.

(w) The Northeasterly 100 feet, measured along the Southeasterly line, of the Northwesterly 200.30 feet of the Southeasterly 801.20 feet, measured along the Southwesterly line, of said Lot 74.

(x) Those portions of said Lot 77 described as follows:

1. The Southeasterly 200 feet of the Northwesterly 400 feet of said Lot 77, said distances being measured along the Southwesterly line of said lot.

2. The Northwesterly 200 feet of said Lot 77, said distance being measured along the Southwesterly line of said lot.

3. Beginning at the Southwest corner of Lot 78 of said Tract No. 5148; thence North $66^{\circ} 40' 01''$ West, along the Southwesterly line of said Lot 77, 152.81 feet; thence North $3^{\circ} 25' 40''$ West, parallel with the West line and North prolongation thereof of said Lot 78, 680 feet to the

(Petitioners' Exhibit No. 1)

true point of beginning; thence North $3^{\circ} 25' 40''$ West, along said parallel line, 91.23 feet to the Northeasterly line of said Lot 77; thence South $62^{\circ} 55' 35''$ East, along said Northeasterly line, 300.58 feet to the Northeast corner of said Lot 77; thence South $14^{\circ} 32' 37''$ East, along the East line of said Lot 77, 77.17 feet to a line parallel with said Southwesterly line and which passes through the true point of beginning; thence North $66^{\circ} 40' 01''$ West, along last described parallel line to the true point of beginning.

4. Beginning at the Southwest corner of Lot 78 of said Tract No. 5148; thence North $66^{\circ} 40' 01''$ West, along the Southwesterly line of said Lot 77, 152.81 feet; thence North $3^{\circ} 25' 40''$ West, parallel with the West line and the North prolongation thereof of said Lot 78, 600 feet to the true point of beginning; thence North $3^{\circ} 25' 40''$ West, along said parallel line, 80 feet; thence South $66^{\circ} 40' 01''$ East, parallel with said Southwesterly line, 307.18 feet to the East line of said lot 77; thence South $14^{\circ} 32' 37''$ East, along said East line, 26.09 feet to an angle point therein; thence South $3^{\circ} 25' 40''$, along said East line to a line parallel with said Southwesterly line and which passes through the true point of beginning; thence North $66^{\circ} 40' 01''$ West, along last described parallel line 312.81 feet to the true point of beginning.

5. Beginning at the Southwest corner of Lot 78 of said Tract No. 5148; thence North $66^{\circ} 40' 01''$ West, along the Southwesterly line of said Lot 77, 152.81 feet; thence North $3^{\circ} 25' 40''$ West, parallel with the West line and the North prolongation thereof of said Lot 78,

(Petitioners' Exhibit No. 1)

200 feet to the true point of beginning; thence North $3^{\circ} 25' 40''$ West along said parallel line, 80 feet; thence South $66^{\circ} 40' 01''$ East, parallel with said Southwesterly line, 312.81 feet to the East line of said Lot 77; thence South $3^{\circ} 25' 40''$ East, along said East line, 80 feet to the Northeast corner of Lot 79 of said Tract No. 5148, thence North $66^{\circ} 40' 01''$ West, along the Northeasterly lines of said Lots 78 and 79 and the Northwesterly prolongation thereof, 312.81 feet to the true point of beginning.

6. Beginning at the Southwest corner of Lot 78 of said Tract No. 5148; thence North $66^{\circ} 40' 01''$ West, along the Southwesterly line of said Lot 77, 152.81 feet; thence North $3^{\circ} 25' 40''$ West, parallel with the West line and the North prolongation thereof of said Lot 78, 440 feet to the true point of beginning; thence North $3^{\circ} 25' 40''$ West, along said parallel line, 80 feet; thence South $66^{\circ} 40' 01''$ East, parallel with said Southwesterly line, 312.81 feet to the East line of said Lot 77; thence South $3^{\circ} 25' 40''$ East, along said East line 80 feet; thence North $66^{\circ} 40' 01''$ West, parallel with said Southwesterly line, to the true point of beginning.

(y) The Northwesterly 200 feet of the Southeasterly 1000 feet of said Lot 83, said distances being measured along the Northeasterly line of said Lot.

(z) The Northwesterly 200 feet of the Southeasterly 800 feet of said Lot 84, said distances being measured along the Southwesterly line of said lot.

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(aa) Those portions of said Lot 87 described as follows:

1. The Northwesterly 200 feet of the Southeasterly 800 feet of said Lot 87, said distances being measured along the Northeasterly line of said lot.

2. The Northwesterly 200 feet of the Southeasterly 1000 feet and the Northwesterly 200 feet of the Southeasterly 1200 feet of said Lot 87, said distances being measured along the Northeasterly line of said lot.

(bb) All of said Lot 88, excepting therefrom the Southeasterly 800 feet thereof, said distances being measured along the Southwest line of said lot.

(cc) All of said Lot 89, excepting therefrom the Southeasterly 400 feet thereof, said distance being measured along the Southwesterly line of said lot.

Parcel 2: The Northwest Quarter of the Northwest Quarter of Section 13; the Southeast Quarter and the North Half of Section 12, all of Section 1; the Northeast Quarter of Section 11; the Southwest Quarter of the Southeast Quarter and the Southwest Quarter of Section 2, all in Township 6 North, Range 14 West, S. B. B. & M., in the County of Los Angeles, State of California.

Excepting from said Parcel 2 the following described parcels of land:

(a) That portion of the North half of the Northwest Quarter of the Northwest Quarter of said Section 13 described as follows:

Beginning at the Southeast corner of said North Half; thence North $0^{\circ} 13' 66''$ West, along the East line of said

(Petitioners' Exhibit No. 1)

North Half, 165 feet; thence North $89^{\circ} 53' 56''$ West 657.90 feet; thence South $0^{\circ} 10' 56''$ East 165 feet to the South line of said North half; thence South $89^{\circ} 53' 56''$ East, along said South line, 658.05 feet to the point of beginning;

(b) That portion of the North Half of the Northwest Quarter of the Northwest Quarter of said Section 13 described as follows:

Beginning at a point in the East line of said North Half that is distant 330 feet North from the Southeast corner thereof; thence North $0^{\circ} 13' 56''$ West, along said East line, 165 feet; thence North $89^{\circ} 53' 56''$ West, 657.60 feet; thence South $0^{\circ} 10' 56''$ East, 165 feet; thence South $89^{\circ} 53' 56''$ East, 657.75 feet to the point of beginning.

(c) That portion of the North Half of the Northwest Quarter of the Northwest Quarter of said Section 13 described as follows:

Beginning at a point in the East line of said North Half that is distant thereon 495 feet North from the Southeast corner thereof; thence North $0^{\circ} 13' 56''$ West, along said East line, 165.94 feet to the Northeast corner of said North Half; thence North $89^{\circ} 53' 56''$ West, along the North line of said Section 13, 657.45 feet; thence South $0^{\circ} 10' 56''$ East, 165.91 feet; thence South $89^{\circ} 53' 56''$ East, 657.60 feet to the point of beginning.

(d) That portion of the South Half of the Northwest Quarter of the Northwest Quarter of said Section 13 described as follows:

Beginning at a point in the South line of said South Half that is distant thereon 1152.58 feet West from the

(Petitioners' Exhibit No. 1)

Southeast corner thereof; thence North $0^{\circ} 08' 41''$ West, 660.89 feet to the North line of said South Half; thence North $89^{\circ} 53' 56''$ West, along said North line, 164.52 feet, to the West line of said Section; thence South $0^{\circ} 07' 56''$ East, along said West line, 660.89 feet to the Southwest corner of said South Half; thence South $89^{\circ} 53' 56''$ East, along said South line, 164.66 feet, to the point of beginning.

(e) That portion of the South Half of the Northwest Quarter of the Northwest Quarter of said Section 13 described as follows:

Beginning at a point in the South line of said South Half that is distant thereon 987.92 feet from the Southeast corner thereof; thence North $0^{\circ} 09' 26''$ West, 660.90 feet to the North line of said South half; thence North $89^{\circ} 53' 56''$ West, along said North line, 164.51 feet; thence South $0^{\circ} 08' 41''$ East 660.89 feet to said South line; thence South $89^{\circ} 53' 56''$ East, 164.66 feet to the point of beginning.

(f) That portion of the Southwest Quarter of said Section 2 lying Southwesterly of Elizabeth Lake Pine Canyon Road, as shown on County Surveyors Map No. 8750, Sheet 2, on file in the office of the County Surveyor of said County.

Said sale will be made, without warranty, express or implied, of any nature whatsoever regarding title, pos-

(Petitioners' Exhibit No. 1)

session or encumbrances, and subject to all of the terms and conditions of the aforesaid Declaration of Trust.

In Witness Whereof, the undersigned, Citizens National Trust & Savings Bank of Los Angeles, as Trustee, has caused this instrument to be executed in its behalf by its Vice President and its Assistant Trust Officer thereunto duly authorized, and its official seal to be hereunto affixed, all as of the 14th day of October, 1940.

CITIZENS NATIONAL TRUST
& SAVINGS BANK OF LOS
ANGELES, TRUSTEE

By Carl P. Smith, Vice President

By Frank A. Ford,

Assistant Trust Officer

(Seal)

CR. 10639

34975

Publish Oct. 17, 24, 31, 1940.

[Verified.]

No. 11527. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 28, 1947. Paul P. O'Brien, Clerk.

5-13-35
Partial Release
Title Insurance and Trust Company
By G. V.

PAYMENTS

FOR VALUE RECEIVED, I, we or either of us, jointly and severally, guarantee payment of this note, with all costs of collection and suit, including reasonable attorney's fees, also agreeing to pay reasonable attorney's fees incurred by the holder of this note, should suit be instituted or other proceedings be taken to enforce this guaranty, or if placed in hands of an attorney for collection. Presentment, protest, notice, and demand of every kind being hereby waived. And we hereby consent to all extensions in the time of payment of said note.

PHILLIPS AND HAMBAUGH REALTY & CONSTRUCTION CORPORATION.

M. L. Smith
President.
R. H. Haulbaugh
Secretary.

W. S. Hall

Released portion of property 11/26/27
Title Insurance and Trust Company.

Released portion of property 3/27/28
J. J. & J. Co.

Released portion of property 5-21-28
Title Insurance and Trust Company.

Los Angeles, California, December 2, 1929

We hereby assign the within note, together with all rights accrued or to accrue under the Deed of Trust securing the same, to Citizens National Trust and Savings Bank as Trustee. (Declaration of Trust No. 5902) PAN AMERICAN BANK OF CALIFORNIA,

BY *M. Ewing*
M. Ewing, Special Deputy Superintendent of Banks in charge of the liquidation.

DATE PAID			DATE DUE		Amount	CREDITED ON		Balance of	To Whom
M.	D.	Y.	M.	D.	Paid	Interest	Principal	Prin. Unpaid	Paid
INTEREST credited through Escrow									
No. 204 to August 19th, 1927.									
8	31	27	10	30	77	61	79	45000	
3	19	28	1	30	78	50	78750	45000	
5	18	28	4	30	78	50	78750	45000	(B)
6	14	29						374	44626
6	16	29	7	30	77	50	78750		
7	16	29			52		52	44090	
10	14	29	10	30	77	58	77158		
11	9	29			44		44	43682	
2	18	29	1	30	76	44	76444		
5	8	29	4	30	76	44	76444		
7	5	29	7	30	76	44	76444		
9	13	29	9	13	32	24	3224		
8	21	29	10	30	29				
9	10	29						28875	4339325
10	3	29						39320	4300005
10	21	29						1585	4298420
12	9	29						12543	4285877
12	9	29	12	30	76	03	76003	18827	4098050
12	9	29			28			28700	4069350
12	9	29						3624	4065720
12	9	29						7607	4058094
1923									
Panama Republic									
Title Insurance & Trust Co									
By [Signature]									

Partial Release
Title Insurance & Trust Co.
By persons

THIS SHEET FOR FURTHER PARTIAL RECONVEYANCE ENDORSEMENTS.

PARTIAL RECONVEYANCE ISSUED SEP 26 1938 19 *HW*
PARTIAL RECONVEYANCE ISSUED OCT 23 1939 19 *HW*
PARTIAL RECONVEYANCE ISSUED OCT 23 1939 19 *HW*
PARTIAL RECONVEYANCE ISSUED DEC 14 1939 19 *HW*
2 PARTIAL RECONVEYANCE ISSUED Oct 17 1940 *CB*
PARTIAL RECONVEYANCE ISSUED DEC 2 - 1940 *HW*
PARTIAL RECONVEYANCE ISSUED JAN 3 - 1941 *HW*
PARTIAL RECONVEYANCE ISSUED JAN 10 1941 *HW*
PARTIAL RECONVEYANCE ISSUED JAN 13 1941 *HW*

(Petitioners' Exhibit No. 6)

[Written]: Hall #41731 P.H. Petitioners' No. 6.

[Endorsed]: Filed Jun. 7, 1946. Edmund L. Smith,
Clerk.

No. 11527. United States Circuit Court of Appeals for
the Ninth Circuit. Filed Jan. 28, 1947. Paul P. O'Brien
Clerk.

[PACIFIC STATES EXHIBIT NO. 2A]

September 2, 1942

Trust 5873

Mr. Frank D. Hall
Leona Valley via
Saugus, California

Dear Mr. Hall:

It has been called to our attention by the Pacific States Corporation that in computing the interest due on your note as set forth in our statement of August 15, 1942, that the interest was not figured on a compounded basis as provided in this note, and that it is their intention to collect interest on this basis.

We therefore wish to advise that the interest figures as set forth in said statement are incorrect and should be disregarded by you.

Yours very truly

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES

By Carl P. Smith

RB Vice President and Trust Officer

In reply please refer to
Mr. O. E. Horstmann
Trust Department

(Pacific States Exhibit No. 2A) September 25, 1942.

Edgar F. Hughes

Citizens National Trust & Savings Bank,
Head Office, Fifth and Spring Street,
Los Angeles, California.

Attention—Mr. Carl P. Smith, Vice President
and Trust Officer—Trust Department.

Gentlemen:

Mr. Frank D. Hall has presented to the writer your letter of August 29th, with the enclosure referred to therein, together with your letter of September 2nd, 1942.

In the statement enclosed in the envelope with your letter of August 29th, you stated at the second last page thereof that the accrued interest from January 30th, 1932 to August 15th, 1942, amounts to the sum of \$20,890.77, but you completely failed to indicate in any way the manner in which such interest was computed or the annual amounts of interest or the basis of your calculation.

In your letter of September 2nd, 1942, you advised Mr. Hall that the interest was not computed on a compounded basis and instructed Mr. Hall to disregard the information in your statement pertaining to the interest, but you failed and neglected to inform Mr. Hall in any manner what your understanding now is as to the exact amount of interest or the method of computation thereof.

As a result of both of your letters and the statement referred to, Mr. Hall does not have any information from you whatsoever as to what you claim to be the amount of accrued interest, and certainly Mr. Hall is entitled to and demands such information. In his behalf, it is therefore

(Pacific States Exhibit No. 2A)

respectfully requested that you now advise Mr. Hall, through this office, what sum of interest you claim to be due, showing in detail the manner of calculation and computation, in order that we may check such information.

This information should be in our possession at the very earliest moment.

Citizens Bank -2- September 25, 1942.

It should be understood, of course, that in the foregoing comments, Mr. Hall is not admitting or conceding the accuracy or correctness of any other portion of the statement. As an illustration, it is our understanding that throughout the entire life of the trust, you have from time to time retained balances of cash on hand for substantial periods before applying the same to the reduction of the debt. The same situation now exists in connection with a cash balance indicated in your last statement. Naturally, we are maintaining that the "balances" should have been forthwith applied so that Mr. Hall would have received the benefit of a prompt reduction in principal for the computation of future interest.

We are also presently advised that notwithstanding the judgment of the trial court prohibiting any threats of sale of the real property involved in this matter, you have from time to time postponed the trustee's sale, thereby threatening to sell the property, at the respective postponed dates. It is our belief that such acts have no validity whatsoever.

Please be governed accordingly.

Very truly yours,

GOUDGE, ROBINSON & HUGHES

By EDGAR F. HUGHES

EFH:F

(Pacific States Exhibit No. 2A)

October 8, 1942

Trust 5873

Mr. F. D. Hall
c/o Goudge, Robinson & Hughes
1007 Van Nuys Building
Los Angeles, California

Dear Mr. Hall:

We enclose for your attention statement showing the computation of interest on the Farm Home Builders note; the total amount due and payable as of October 30, 1942, being \$55,479.75, which includes interest, compounded interest and principal. The reason for this figure being computed to October 30, 1942, is due to the fact that the note calls for interest payable quarterly in advance.

Yours very truly

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES

By Carl P. Smith

OEHRB

Vice President and Trust Officer

In reply please refer to
Mr. O. E. Horstmann
Trust Department

cc—Pacific States Corporation
Merritt Building
Los Angeles, California

(Pacific States Exhibit No. 2A)

October 16, 1942.

Edgar F. Hughes

Citizens National Trust & Savings Bank,
Head Office, Fifth and Spring Streets,
Los Angeles, California.

Attention—Mr. Carl P. Smith, Vice President
and Trust Officers—Trust Department.

Gentlemen:

Re: Hall v. Citizens Bank et al

We have been instructed by Mr. F. D. Hall to acknowledge receipt by him of your communication of the 8th inst., in which you enclosed a statement showing an alleged computation of interest on the Farm Home Builders note, and purporting to indicate a balance of \$55,-479.75, which you state included interest, compounded interest, and principal, and which you now represent is the balance due and payable as of October 30th, 1942.

In reply to your communication, you will please be advised that Mr. Hall rejects and refuses to accept your alleged statement as a true or correct computation of the balance which is due or payable on the said promissory note. Mr. Hall denies that the promissory note calls for the compounding of interest, and also denies that there is any liability for interest on interest after the maturity date of the note. Mr. Hall also reminds you that no credit has been given for collections which he understands you have made, and have on hand, and which are applicable to the payment of principal and interest, and further that you have apparently made no allowance for the delay from time to time over the period of your

(Pacific States Exhibit No. 2A)

trusteeship in the application of collections to the payment of principal or interest.

To further demonstrate the inaccuracy of your present statement, we call your attention to your own previous statements, and to the testimony given by your representative, Mr. Chamberlain, at the trial of the case, and to the arguments sanctioned by, and made on behalf of, your bank and the Pacific States Corporation in the brief on appeal in this case. For your convenience, we have prepared excerpts from the testimony and from the opening brief of your counsel on the appeal, which we have incorporated on a separate memorandum enclosed herewith.

It should, of course, be understood that neither by this letter, or otherwise, have our clients admitted any liability whatsoever: and all negotiations have and will be conducted upon that definite understanding.

Citizens Bank

-2-

October 15, 1942.

We sincerely trust that you will agree with us that your computations are erroneous and incorrect.

Respectfully,

GOUDGE, ROBINSON & HUGHES

By Edgar F. Hughes

EFH:F

U. S. District Court, No. 41731 P.H. Pac. States Exhibit No. 2A. Filed 10-4-43. E. Sidney Laughlin, Conciliation Commissioner.

No. 11527. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 28, 1947. Paul P. O'Brien, Clerk.

[PACIFIC STATES EXHIBIT NO. 2AA]

COMPUTATION OF INTEREST ON NOTE OF
FARM HOME BUILDERS, INC.

Payable to Pan American Bank—

Original Amount \$45,000.00

Note Dated 7/30/27, Due on or Before 7/30/42

Interest 7% Per Annum—Payable Quarterly in Advance

Interest credited on Note through Escrow to 8/19/27

<u>Date</u>		<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
					\$45,000.00
8/19/27	Int. 8/19/27 to 10/30/27	621.29			621.29
					<hr/> 45,621.29
8/31/27	Int. 8/19/27 to 8/31/27 on Unpaid Int. of 621.29 (12 days)	1.45			1.45
					<hr/> 45,622.74
8/31-27	Int. a/c 8/19/27 to 10/30/27		621.29		621.29
					<hr/> 45,001.45
10/30/27	Int. 10/30/27 to 1/30/28	787.52			787.52
					<hr/> 45,788.97
3/29/28	Int. 10/30/27 to 3/29/28 on Unpaid Int. of 787.52 (150 days)	22.95			22.95
					<hr/> 45,811.92
3/29/28	Int. a/c 10/30/27 to 1/30/28		787.50		787.50
					<hr/> 45,024.42
1/30/28	Int. 1/30/28 to 4/30/28	787.92			787.92
					<hr/> 45,812.34

(Pacific States Exhibit No. 2AA)

<u>Date</u>		<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
4/30/28	Int. 1/30/28 to 4/30/28 on Unpaid Int. of 787.92 (90 days)	13.77			13.77
					<hr/> 45,826.11
4/30/28	Int. 4/30/28 to 7/30/28	801.95			801.95
					<hr/> 46,628.06
5/18/28	Int. a/c 1/30/28 to 4/30/28		787.50		787.50
					<hr/> 45,840.56
5/18/28	Credit on Int. Charged 5/18/28 to 7/30/28 72 days on 787.50		11.02		11.02
					<hr/> 45,829.54
6/14/28	Principal Payment			374.00	374.00
					<hr/> 45,455.54
6/14/28	Credit on Int. Charged 6/14/28 to 7/30/28 46 days on 370.00		3.35		3.35
					<hr/> 45,452.19
6/26/28	Int. a/c 4/30/28 to 7/30/28		787.50		787.50
					<hr/> 44,664.69
6/26/28	Int. 4/30/28 to 6/26/28 on Unpaid Int. due 4/30/28 801.95 (57 days)	8.89			8.89
					<hr/> 44,673.58
7/26/28	Principal Payment			536.00	536.00
					<hr/> 44,137.58
	Credit Int. 7/26/28 to 7/30/28 4 days on 536.00		.41		.41
					<hr/> 44,137.17
7/30/28	Int. 7/30/28 to 10/30/28	772.40			772.40
					<hr/> 44,909.57

(Pacific States Exhibit No. 2AA)

<u>Date</u>	<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
Balance brought forward				\$44,909.57
8/14/28 Int. 7/30/28 to 8/14/28 on Unpaid Int. of 772.40 (14 days)	2.10			2.10
				<hr/> 44,911.67
8/14/28 Int. a/c 7/30/28 to 10/30/28		771.58		771.58
				<hr/> 44,140.09
10/29/28 Principal Payment			408.00	408.00
				<hr/> 43,732.09
Credit Int. 1 day on 408.00		.08		.08
				<hr/> 43,732.01
10/30/28 Int. 10/30/28 to 1/30/29	765.32			765.32
				<hr/> 44,497.33
11/ 9/28 Int. a/c 10/30/28 to 1/30/29		764.44		764.44
				<hr/> 43,732.89
Int. 10/30/28 to 11/9/28 9 days on 765.32	1.34			1.34
				<hr/> 43,734.23
1/30/29 Int. 1/30/29 to 4/30/29	765.35			765.35
				<hr/> 44,499.58
2/18/29 Int. a/c 1/30/29 to 4/30/29		764.44		764.44
				<hr/> 43,735.14
Int. 1/30/29 to 2/18/28 18 days on 765.35	2.67			2.67
				<hr/> 43,737.81
4/30/29 Int. 4/30/29 to 7/30/29	765.40			765.40
				<hr/> 44,503.21
5/ 8/29 Int. a/c 4/30/29 to 7/30/29		764.44		764.44
				<hr/> 43,738.77
5/ 8/29 Int. 4/30/29 to 5/8/29 8 days on 765.40	1.18			1.18
				<hr/> 43,739.95
7/30/29 Int. 7/30/29 to 10/30/29	765.44			765.44
				<hr/>

(Pacific States Exhibit No. 2AA)

<u>Date</u>		<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
7/30/29	Int. a/c 7/30/29 to 9/13/29		382.22		44,505.39 382.22
9/13/29	Int. a/c 9/13/29 to 10/30/29		382.22		44,123.17 382.22
	Int. from 7/30/29 to 9/13/29 44 days on 382.22	3.28			43,740.95 3.28
8/21/29	Principal Payment			288.75	43,744.23 288.75
	Credit Int. 8/21/29 to 10/30/29 70 days on 288.75		3.92		43,455.48 3.92
9/10/29	Principal Payment			393.20	43,451.56 393.20
	Credit Int. 9/10/29 to 10/30/29 50 days on 393.20		3.83		43,058.36 3.83
10/ 3/29	Principal Payment			15.85	43,054.53 15.85
	Int. 10/3/29 to 10/30/29 27 days on 15.85		.07		43,038.68 .07
10/22/29	Principal Payment			125.43	43,038.61 125.43
	Credit Int. 10/22/29 to 10/30/29 8 days on 125.43		.19		42,913.18 .19
10/30/29	Int. 10/30/29 to 1/30/30	750.98			42,912.99 750.98
12/ 9/29	Int. a/c 10/30/29 to 1/30/30		750.03		43,663.97 750.03
					42,913.94

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<u>Date</u>	<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
Balance brought forward				\$42,913.94
Int. 10/30/29 to 12/9/29				
39 days on 750.98	5.69			5.69
				<hr/>
12/ 9/29 Principal Payment			1,878.27	42,919.63
				1,878.27
				<hr/>
12/ 9/29 Principal Payment			287.00	41,041.36
				287.00
				<hr/>
				40,754.36
Credit Int. 12/9/29 to 1/30/30				
52 days on 2,165.27		21.88		21.88
				<hr/>
				40,732.48
1/30/30 Int. 1/30/30 to 4/30/30	712.82			712.82
				<hr/>
				41,445.30
2/18/30 Principal Payment			36.24	36.24
				<hr/>
				41,409.06
Credit Int. 2/18/30 to 4/30/30				
71 days on 36.24		.49		.49
				<hr/>
				41,408.57
2/ 5/30 Int. a/c 1/30/30 to 4/30/30		694.86		694.86
				<hr/>
				40,713.71
Int. 1/30/30 to 2/5/30 or				
5 days on 712.82	.67			.67
				<hr/>
				40,714.38
3/15/30 Principal Payment			176.32	176.32
				<hr/>
				40,538.06
4/15/30 Principal Payment			20.05	20.05
				<hr/>
				40,518.01
4/30/30 Int. 4/30/30 to 7/30/30	709.07			709.07
				<hr/>
				41,227.08
5/ 9/30 Bal. Int. to 4/30/30				
Int. 712.13 Paid 2/5/30 694.86		17.27		17.27
				<hr/>
				41,209.81
5/ 9/30 Int. a/c 4/30/30 to 7/30/30		708.07		708.07
				<hr/>
				40,501.74

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<u>Date</u>		<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
5/ 9/30	Int. 4/30/30 to 5/9/30 on 709.07 9 days	1.25			1.25
					<hr/> 40,502.99
5/15/30	Principal Payment			29.95	29.95
					<hr/> 40,473.04
5/16/30	Principal Payment			7.50	7.50
					<hr/> 40,465.54
	Credit Int. 5/15/30 to 7/30/30 on payment 29.95 75 days		.44		.44
					<hr/> 40,465.10
	Credit Int. 5/16/30 to 7/30/30 on 7.50 75 days		.10		.10
					<hr/> 40,465.00
6/16/30	Principal Payment			574.14	574.14
					<hr/> 39,890.86
	Credit Int. 6/16/30 to 7/30/30 44 days on 574.14		4.91		4.91
					<hr/> 39,885.95
7/15/30	Principal Payment			32.15	32.15
					<hr/> 39,853.80
	Credit Int. 7/15/30 to 7/30/30 on 32.15 15 days		.09		.09
					<hr/> 39,853.71
7/30/30	Int. 7/30/30 to 10/30/30	697.43			697.43
					<hr/> 40,551.14
8/ 2/30	Int. a/c 7/30/30 to 10/30/30		696.80		696.80
					<hr/> 39,854.34
	Int. 7/30/30 to 8/2/30 on 697.43 2 days	.27			.27
					<hr/> 39,854.61
8/13/30	Principal Payment			54.40	54.40
					<hr/> 39,800.21

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<u>Date</u>		<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
	Balance brought forward				\$39,800.21
9/13/30	Principal Payment			56.63	56.63
					<hr/> 39,743.58
10/16/42	Principal Payment			60.65	60.65
					<hr/> 39,682.93
10/30/30	Credit Int. 8/13/30 to 10/30/30 on 54.40 77 days		.81		.81
					<hr/> 39,682.12
10/30/30	Credit Int. 9/13/30 to 10/30/30 on 56.63 47 days		.51		.51
					<hr/> 39,681.61
10/30/30	Credit Int. 10/16/30 to 10/30/30 on 60.65 14 days		.16		.16
					<hr/> 39,681.45
10/30/30	Int. 10/30/30 to 1/30/31	694.42			694.42
					<hr/> 40,375.87
11/ 7/30	Int. a/c 10/30/30 to 1/30/31		693.80		693.80
					<hr/> 39,682.07
	Int. 10/30/30 to 11/7/30 on 694.42 7 days	.94			.94
					<hr/> 39,683.01
11/19/30	Principal Payment			72.08	72.08
					<hr/> 39,610.93
	Credit Int. 11/19/30 to 1/30/31 72 days on 72.08		1.01		1.01
					<hr/> 39,609.92
1/21/31	Principal Payment			85.30	85.30
					<hr/> 39,524.62
	Credit Int. 1/21/31 to 1/30/31 9 days on 85.30		.14		.14
					<hr/> 39,524.48
1/30/31	Int. 1/30/31 to 4/30/31	691.67			691.67
					<hr/> 40,216.15
2/ 9/31	Int. a/c 1/30/31 to 4/30/31		691.04		691.04
					<hr/> 39,525.11

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<u>Date</u>	<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
Int. 1/30/31 to 2/9/31 9 days on 691.67	1.21			1.21
				<hr/> 39,526.32
2/17/31 Principal Payment			129.55	129.55
				<hr/> 39,396.77
Credit Int. 2/17/31 to 4/30/31 on 129.55 72 days		1.81		1.81
				<hr/> 39,394.96
3/19/31 Principal Payment			115.05	115.05
				<hr/> 39,279.91
Credit Int. 3/19/31 to 4/30/31 42 days on 115.05		.94		.94
				<hr/> 39,278.97
4/17/31 Principal Payment			233.83	233.83
				<hr/> 39,045.14
Credit Int. 4/17/31 to 4/30/31 13 days on 233.83		.59		.59
				<hr/> 39,044.55
4/30/31 Int. 4/30/31 to 7/30/31	683.27			683.27
				<hr/> 39,727.82
5/13/31 Principal Payment			266.24	266.24
				<hr/> 39,461.58
Credit Int. 5/13/31 to 7/30/31 78 days on 266.24		4.03		4.03
				<hr/> 39,457.55
6/23/31 Principal Payment			108.54	108.54
				<hr/> 39,349.01
Credit Int. 6/23/31 to 7/30/31 37 days on 108.54		.78		.78
				<hr/> 39,348.23
7/ 3/31 Int. a/c 4/30/31 to 7/30/31		682.66		682.66
				<hr/> 38,665.57

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<u>Date</u>	<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
Balance brought forward			.	\$38,665.57
Int. 4/30/31 to 7/3/31 on				
Unpaid Int. on 683.27 (64 days)	8.51			8.51
				<hr/>
				38,674.08
7/15/31 Principal Payment			145.94	145.94
				<hr/>
				38,528.14
Credit Int. 7/15/31 to 7/30/31				
15 days on 145.94		.42		.42
				<hr/>
				38,527.72
7/30/31 Int. 7/30/31 to 10/30/31	674.22			674.22
				<hr/>
				39,201.94
8/14/31 Principal Payment			921.99	921.99
				<hr/>
				38,279.95
Credit Int. 8/14/31 to 10/30/31				
77 days on 921.99		13.80		13.80
				<hr/>
				38,266.15
9/17/31 Principal Payment			946.04	946.04
				<hr/>
				37,320.11
Credit Int. 9/17/31 to 10/30/31				
43 days on 946.04		7.91		7.91
				<hr/>
				37,312.20
9/26/31 Int. a/c 7/30/31 to 10/30/31		673.56		673.56
				<hr/>
				36,638.64
Int. 7/30/31 to 9/26/31				
57 days on 674.22	7.47			7.47
				<hr/>
				36,646.11
10/16/31 Principal Payment			131.09	131.09
				<hr/>
				36,515.02
Credit Int. 10/16/31 to 10/30/31				
14 days on 131.09		.35		.35
				<hr/>
				36,514.67
10/30/31 Int. 10/30/31 to 1/30/32	639.00			639.00
				<hr/>
				37,153.67

(Pacific States Exhibit No. 2AA)

<u>Date</u>		<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
11/17/31	Principal Payment			615.96	615.96
	Credit Int. 11/17/31 to 1/30/32				36,537.71
	74 days on 615.96		8.84		8.84
					36,528.87
1/13/32	Principal Payment			273.20	273.20
	Credit Int. 1/13/32 to 1/30/32				36,255.67
	17 days on 273.20		.89		.89
					36,254.78
1/30/32	Int. 1/30/32 to 4/30/32	634.45			634.45
					36,889.23
2/17/32	Principal Payment			201.69	201.69
	Credit Int. 2/17/32 to 4/30/32				36,687.54
	72 days on 201.69		2.81		2.81
					36,684.73
3/23/32	Principal Payment			205.95	205.95
	Credit Int. 3/23/32 to 4/30/32				36,478.78
	38 days on 205.95		1.52		1.52
					36,477.26
3/29/32	Int. a/c 10/30/32 to 1/30/32		645.29		645.29
					35,831.97
3/29/32	Credit Int. on delinquent				
	Interest 10/30/31 to 3/29/32		18.56		18.56
					35,813.41
4/21/32	Principal Payment			215.82	215.82
	Credit Int. 4/21/32 to 4/30/32				35,597.59
	9 days on 215.82		.37		.37
					35,597.22

(Pacific States Exhibit No. 2AA)

<u>Date</u>	<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
				\$35,597.22
4/30/32	Balance brought forward			
	Int. 4/30/32 to 7/30/32	622.94		622.94
				<hr/>
				36,220.16
5/16/32	Principal Payment		148.40	148.40
				<hr/>
				36,071.76
	Credit Int. 5/16/32 to 7/30/32			
	74 days on 148.40	2.14		2.14
				<hr/>
				36,069.62
6/16/32	Principal Payment		192.30	192.30
				<hr/>
				35,877.32
	Credit Int. 6/16/32 to 7/30/32			
	44 days on 192.30	1.65		1.65
				<hr/>
				35,875.67
7/15/32	Principal Payment		561.51	561.51
				<hr/>
				35,314.16
	Credit Int. 7/15/32 to 7/30/32			
	15 days on 561.51	1.64		1.64
				<hr/>
				35,312.52
7/30/32	Int. 7/30/32 to 10/30/32	617.97		617.97
				<hr/>
				35,930.49
9/13/32	Principal Payment		312.16	312.16
				<hr/>
				35,618.33
	Credit Int. 9/13/32 to 10/30/32			
	47 days on 312.16	2.85		2.85
				<hr/>
				35,615.48
10/15/32	Principal Payment		205.48	205.48
				<hr/>
				35,410.00
	Credit Int. 10/15/32 to 10/30/32			
	15 days on 205.48	.59		.59
				<hr/>
				35,409.41
10/30/32	Int. 10/30/32 to 1/30/33	619.66		619.66
				<hr/>
				36,029.07

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<u>Date</u>		<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
1/16/33	Principal Payment			447.33	447.33
					<hr/> 35,581.74
	Credit Int. 1/16/33 to 1/30/33 14 days on 447.33		1.22		1.22
					<hr/> 35,580.52
1/30/33	Int. 1/30/33 to 4/30/33	622.70			622.70
					<hr/> 36,203.22
4/30/33	Int. 4/30/33 to 7/30/33	633.59			633.59
					<hr/> 36,836.81
5/13/33	Principal Payment			1,262.82	1,262.82
					<hr/> 35,573.99
	Credit Int. 5/13/33 to 7/30/33 78 days on 1,262.82		19.14		19.14
					<hr/> 35,554.85
7/30/33	Int. 7/30/33 to 10/30/33	622.25			622.25
					<hr/> 36,177.10
9/ 8/33	Principal Payment			432.04	432.04
					<hr/> 35,745.06
	Credit Int. 9/8/33 to 10/30/33 52 days on 432.04		4.36		4.36
					<hr/> 35,740.70
10/30/33	Int. 10/30/33 to 1/30/34	625.50			625.50
					<hr/> 36,366.20
1/30/34	Int. 1/30/34 to 4/30/34	636.44			636.44
					<hr/> 37,002.64
2/26/34	Principal Payment			451.30	451.30
					<hr/> 36,551.34
2/26/34	Credit Int. 2/26/33 to 4/30/34 63 days on 451.30		5.52		5.52
					<hr/> 36,545.82
4/30/34	Int. 4/30/34 to 7/30/34	639.59			639.59
					<hr/> 37,185.41

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<u>Date</u>		<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
	Balance brought forward				\$37,185.41
6/18/34	Principal Payment			667.45	667.45
					<hr/> 36,517.96
6/18/34	Credit Int. 6/18/34 to 7/30/34 42 days on 667.45		5.45		5.45
					<hr/> 36,512.51
7/30/34	Int. 7/30/34 to 10/30/34	638.97			638.97
					<hr/> 37,151.48
10/30/34	Int. 10/30/34 to 1/30/35	650.15			650.15
					<hr/> 37,801.63
1/30/35	Int. 1/30/35 to 4/30/35	661.52			661.52
					<hr/> 38,463.15
2/18/35	Principal Payment			306.22	306.22
					<hr/> 38,156.93
	Credit Int. 2/18/35 to 4/30/35 71 days on 306.22		4.22		4.22
					<hr/> 38,152.71
4/30/35	Int. 4/30/35 to 7/30/35	667.67			667.67
					<hr/> 38,820.38
7/30/35	Int. 7/30/35 to 10/30/35	679.35			679.35
					<hr/> 39,499.73
10/30/35	Int. 10/30/35 to 1/30/36	691.24			691.24
					<hr/> 40,190.97
1/30/36	Int. 1/30/36 to 4/30/36	703.35			703.35
					<hr/> 40,894.32
3/10/36	Principal Payment			634.54	634.54
					<hr/> 40,259.78
	Credit Int. 3/10/36 to 4/30/36 51 days on 634.54		6.29		6.29
					<hr/> 40,253.49
4/30/36	Int. 4/30/36 to 7/30/36	704.43			704.43
					<hr/> 40,957.92

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<u>Date</u>	<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
7/30/36 Int. 7/30/36 to 10/30/36	716.75			716.75
				41,674.67
10/30/36 Int. 10/30/36 to 1/30/37	729.20			729.20
				42,403.87
1/30/37 Int. 1/30/37 to 4/30/37	742.06			742.06
				43,145.93
4/30/37 Int. 4/30/37 to 7/30/37	755.04			755.04
				43,900.97
5/ 4/37 Principal Payment			900.14	900.14
				43,000.83
5/ 4/37 Credit Int. 5/4/37 to 7/30/37 87 days on 900.14		15.23		15.23
				42,985.60
7/30/37 Int. 7/30/37 to 10/30/37	752.24			752.24
				43,737.84
8/23/37 Principal Payment			363.85	363.85
				43,373.99
8/23/37 On Acct. of Int.		363.85		363.85
				43,010.14
Credit Int. 8/23/37 to 10/30/37 68 days on 363.85		4.80		4.80
				43,005.34
Credit Int. 8/23/37 to 10/30/37 68 days on 363.85		4.80		4.80
				43,000.54
10/30/37 Int. 10/30/37 to 1/30/38	752.50			752.50
				43,753.04
1/30/38 Int. 1/30/38 to 4/30/38	765.68			765.68
				44,518.72
3/18/38 Principal Payment			952.41	952.41
				43,566.31
Credit Int. 3/18/38 to 4/30/38 43 days on 952.41		7.97		7.97
				43,558.34

(Pacific States Exhibit No. 2AA)

<u>Date</u>		<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
	Balance brought forward				\$43,558.34
4/30/38	Int. 4/30/38 to 7/30/38	762.26			762.26
					<hr/>
7/30/38	Int. 7/30/38 to 10/30/38	775.60			44,320.60
					775.60
					<hr/>
10/14/38	Principal Payment			732.00	45,096.20
					732.00
					<hr/>
	Credit Int. 10/14/38 to 10/30/38				44,364.20
	16 days on 732.00		2.27		2.27
					<hr/>
10/30/38	Int. 10/30/38 to 1/30/39	776.33			44,361.93
					776.33
					<hr/>
1/30/39	Int. 1/30/39 to 4/30/39	789.92			45,138.26
					789.92
					<hr/>
2/24/39	Principal Payment			1,221.95	45,928.18
					1,221.95
					<hr/>
	Credit Int. 2/24/39 to 4/30/39				44,706.23
	65 days on 1,221.95		15.45		15.45
					<hr/>
4/30/39	Int. 4/30/39 to 7/30/39	782.08			44,690.78
					782.08
					<hr/>
7/30/39	Int. 7/30/39 to 10/30/39	795.77			45,472.86
					795.77
					<hr/>
10/30/39	Int. 10/30/39 to 1/30/40	809.69			46,268.63
					809.69
					<hr/>
1/30/40	Int. 1/30/40 to 4/30/40	823.87			47,078.32
					823.87
					<hr/>
4/30/40	Int. 4/30/40 to 7/30/40	838.29			47,902.19
					838.29
					<hr/>
5/23/40	Principal Payment			1,264.08	48,740.48
					1,264.08
					<hr/>
					47,476.40

(Pacific States Exhibit No. 2AA)

<u>Date</u>		<u>Interest Added</u>	<u>Interest Payments & Credits</u>	<u>Principal Payments</u>	<u>Unpaid Balance</u>
	Credit Int. 5/23/40 on 7/30/40 68 days on 1,264.08		16.70		16.70
7/30/40	Int. 7/30/40 to 10/30/40	830.54			47,459.70 830.54
10/30/40	Int. 10/30/40 to 1/30/41	845.08			48,290.24 845.08
1/30/41	Int. 1/30/41 to 4/30/41	859.87			49,135.32 859.87
4/30/41	Int. 4/30/41 to 7/30/41	874.91			49,995.19 874.91
7/30/41	Int. 7/30/41 to 10/30/41	890.23			50,870.10 890.23
10/30/41	Int. 10/30/41 to 1/30/42	905.80			51,760.33 905.80
1/30/42	Int. 1/30/42 to 4/30/42	921.66			52,666.13 921.66
4/30/42	Int. 4/30/42 to 7/30/42	937.77			53,587.79 937.77
7/30/42	Int. 7/30/42 to 10/30/42	954.19			54,525.56 954.19
		\$45,228.21	\$13,669.68	\$21,078.78	55,479.75

-8-

U. S. District Court, No. 41731 P.H. Pac. States Exhibit 2AA for iden. Filed 10-5-43. H. Sidney Laughlin, Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. Edmund L. Smith, Clerk.

No. 11527. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 28, 1947. Paul P. O'Brien, Clerk.

[PACIFIC STATES EXHIBIT NO. 2B]

PACIFIC STATES CORPORATION

August 31, 1942

Citizens National Trust & Savings Bank

Fifth and Spring Streets

Los Angeles, California

Attention: Mr. O. E. Horstman, Trust Department

Gentlemen:

Your Trust No. 5873

This is in reference to the statement of Trust No. 5873 of the Farm Home Builders, Inc., from January 1, 1941, to August 15, 1942, which we received from you this morning attached to your letter dated August 29, 1942.

This is to confirm our conversation with Mr. Horstman regarding the amount of accrued interest which you have set up on one of the pages under, "Statement of Release Obligation in Favor of Pan American Bank: (Now the Pacific States Corporation)."

You show the accrued interest from January 30, 1942, to August 15, 1942, as \$20,890.77. As we called to Mr. Horstman's attention, we do not believe you have accrued the interest in accordance with the terms and provisions of the note, which provide that interest shall accrue until paid at the rate of seven percent (7%) per annum, payable quarterly in advance, and should the interest be not so paid it shall thereafter bear like interest as the principal.

(Pacific States Exhibit No. 2B)

We have accrued the interest on such a compound basis and find that it amounts to a great deal more than the figures shown on your statement.

We believe that the interest should be refigured in accordance with the terms of the note and a corrected statement be issued, as we understand a copy of this statement has also been issued to Mr. Hall.

We are enclosing a printed copy of the opinion handed down by the Appellate Court in the case of Hall vs. Citizens, et al. We are also enclosing a copy of a letter dated August 28, 1942, from Elbert W. Davis to Richard L. North, setting forth a slight modification in the opinion. The letter is self-explanatory.

Very truly yours,

A. Q. Robison

AQR:H

Secretary

Enc.

U. S. District Court, No. 41731 P.H. Pac. States Exhibit No. 2B. Filed 10-4-43. H. Sidney Laughlin, Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. Edmund L. Smith, Clerk.

No. 11527. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 28, 1947. Paul P. O'Brien, Clerk.

[PACIFIC STATES EXHIBIT NO. 2C]

PAN AMERICAN BANK OF CALIFORNIA

Commercial-Trust-Savings

In Liquidation

~~Broadway at Eighth~~

Los Angeles

Telephone	703 California Building
MUtual 8545	205 S. Broadway

May 24, 1932

Citizens Nat'l Trust & Savings Bank,
Fifth & Spring Streets,
Los Angeles, California.

Attention: Mr. Slater,
Assistant Trust Officer

Gentlemen:

This is in reference to your Trust No. 5873 unofficially known as the Farm Home Builders, Incorporated, effecting property which is covered by a deed of trust securing a note in favor of the Pan American Bank of California.

We called Mr. Slater's attention to the fact that your Declaration of Trust provides that in the event of a default in the payment of interest on our note that all of the money in the trust should be used to cure the default and no money should be paid to either the owners or agents as long as the interest is past due and delinquent.

(Pacific States Exhibit No. 2C)

This is to inform you that the interest due on April 30, 1932 was not paid when due, nor has any portion thereof since been paid and technically the note is now in default and subject to the whole sum of principal and interest becoming immediately due and payable at our option.

We hereby request that you as Trustee, exercise the provisions of the Declaration of Trust and pay no money either to the agents or owners under the Declaration of Trust until this default has been cured.

This is *scpecially* desired in the case of Phillips and Hambaugh Realty & Construction Company as agents, as they together with F. D. Hall and M. S. Hall, have guaranteed the payment of the note.

Yours very truly,

A. Q. Robison

A. Q. Robison,

Special Deputy

AQR-A

Superintendent of Banks.

[Stamped]: Received May 25, 1932, Trust Dept. Citizens Banks.

U. S. District Court, No. 41731 P.H. Pac. States Exhibit No. 2C. Filed 10-5-43. H. Sidney Laughlin, Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. Edmund L. Smith, Clerk.

No. 11527. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 28, 1947. Paul P. O'Brien, Clerk.

[PACIFIC STATES EXHIBIT NO. 2F]

STATEMENT OF INTEREST PAYMENTS

on that certain note in the original amount of \$45,000.00, dated 7/30/27, executed by Farm Home Builders, Inc., to Pan American Bank of California made by Citizens National Trust & Savings Bank of Los Angeles, as Trustee under its Trust No. 5873, Farm Home Builders, Inc., and Trustee under its Trust No. 5902, Pan American Bank of California.

<u>1930</u>				<u>Check No.</u>	
2/ 6	Pan American Bank			-	
	Interest on Farm Home Builders, Inc., Note	1/30/30	4/30/30	22285	\$ 694.86
5/10	Pan American Bank				
	Balance interest on Farm Home Builders, Inc., Note		5/1 /30	27055	17.27
	Interest on Farm Home Builders, Inc. Note	5/ 1/30	7/31/30	27055	708.07
8/ 4	Pan American Bank				
	Interest on Farm Home Builders, Inc., obligation	7/31/30	10/31/30	31019	696.80
11/ 6	Pan American Bank				
	Interest on Farm Home Builders, Inc., Note	10/30/30	1/30/31	35747	693.80
<u>1931</u>					
2/ 9	Pan American Bank				
	Interest on Farm Home Builders, Inc., Note	1/30/31	4/30/31	40391	691.04
*7/ 3	Pan American Bank				
	Interest on Farm Home Builders, Inc., Note	4/30/31	7/30/31	46890	682.66
*9/26	Pan American Bank				
	Interest on Farm Home Builders, Inc., Note	7/30/31	10/30/31	50435	673.56

(Pacific States Exhibit No. 2F)

1932

*3/29	Pan American Bank				
	Interest on Farm Home Build-				
	ers, Inc., obligation	10/30/31	1/30/32	58153	645.29
	Interest on delinquent interest	10/30/31	1/30/32	58153	18.56
					<hr/>
					\$5,521.91
					<hr/>

This is to certify that the foregoing is a correct statement according to the records of Citizens National Trust & Savings Bank of Los Angeles as Trustee under its Trusts 5873 and 5902 of all funds paid by it to date on account of interest on the obligation identified in the caption hereof.

Dated 10/13/43

[Signature illegible]

Assistant Trust Officer

*Note: Paid from Trust 5873 direct

U. S. District Court, No. 41731 P.H. Pac. States Exhibit No. 2F. Filed 10-14-43. H. Sidney Laughlin, Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. Edmund L. Smith, Clerk.

No. 11527. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 28, 1947. Paul P. O'Brien, Clerk.

[PACIFIC STATES EXHIBIT NO. 2G]

Leona Valley via
Saugus, California
August 9, 1942.

Citizens National Trust and Savings Bank,
Spring Street at Fifth,
Los Angeles, California.

Attention Trust Department:

Dear Sirs:

Relative to your Trust No. 5873, Farm Home Builders, Inc. It has been a considerable time since there has been a statement issued as to the condition of said trust. Will you please have prepared now such a statement, and in connection with the same will you prepare a detailed statement of balance due on the note to Pan American Bank showing computation of interest to say July 1, 1942

Please mail same to me in care of Mr. E. F. Hughes, 1007 I. N. Van Nuys Building, Seventh and Spring Streets, Los Angeles, California.

Thanking you, I am,

Respectfully yours,

F. D. Hall

F. D. Hall

[Written]: Make stmt as of 8/15/42

U. S. District Court, No. 41731 P.H. Pac. States Exhibit No. 2G. Filed 10-14-43. H. Sidney Laughlin, Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. Edmund L. Smith, Clerk.

No. 11527. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 28, 1947. Paul P. O'Brien, Clerk.

[PACIFIC STATES EXHIBIT 21]

September 9, 1932.

Los Angeles, Calif.

Cirizens National Trust & Savings Bank,
Los Angeles, California.

Gentlemen: Attention: Trust Dept.

In re: Trust No. 5873

Will you kindly charge the account of F. D. Hall,
agent, with \$123.55, and apply as follows:

\$84.00 to accompany Report of Sale hereto at-
tached, Parcel A, Lot 4, to Florence E. Patterson;

\$22.50 to credit of Bernice Trehearne contract of
purchase in said trust, paying interest to July 1st,
1932, balance to account principal;

\$17.05 to satisfy two charges in your Mr. Ul-
restad's department.

All other moneys accruing to said agent account you
will please transfer to the general trust account that it
may be available for interest payment to Pan-American
Bank.

Also if there is not money enough on hand at any
time to make one quarterly interest payment to said bank,
but there is enough to make a one-half quarterly pay-
ment, please make the one-half payment.

Yours truly,

F. D. Hall

[Written]: S. claims this refers to the last quarterly
interest before maturity

[Written]: Pacific States 21 (copy) orig in transcript

[Endorsed: Filed Jun. 7, 1946. Edmund L. Smith,
Clerk.

[CITIZEN'S BANK EXHIBIT NO. 4]

CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES

DECLARATION OF TRUST NO. 5873

This Declaration of Trust made this the 2nd day of December, 1929, by and between Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, organized and existing under the Laws of the United States of America, and having its principal place of business in the City and County of Los Angeles, State of California, hereinafter sometimes called the "Trustee", party of the first part; Farm Home Builders Incorporated, a Corporation, hereinafter sometimes called the "Trustor" and/or "Beneficiary", party of the second part; Pan-American Bank of California, a Corporation, having its principal place of business in the City and County of Los Angeles, State of California, hereinafter sometimes called the "First Payee", party of the third part, and Phillips & Hambaugh Realty & Construction Company, a Corporation, of Los Angeles, California, hereinafter sometimes called "Second Payee", party of the fourth part,

WITNESSETH:

That, Whereas, the Trustor has caused to be conveyed to the Trustee, that certain real property, situate in the County of Los Angeles, State of California, and more particularly described in Exhibit "A", attached hereto and made a part of this Declaration of Trust, and

Whereas, the Pan American Bank of California, has assigned to the Trustee, the Seller's interest in those cer-

(Citizens's Bank Exhibit No. 4)

tain Agreements of Sale of Real Estate, described in Exhibit "B", attached hereto and made a part of this Declaration of Trust, and

Whereas, the Farm Home Builders Incorporated, are indebted to the Pan American Bank of California, as evidenced by one certain Promissory note, copy of which is attached hereto, marked Exhibit "C" and made a part of this Declaration of Trust, and

Whereas, said Note in favor of the Pan American Bank of California, is secured by a Deed of Trust, covering that certain real property described in Exhibit "A", copy of which Trust Deed is attached hereto, marked Exhibit "D" and made a part of this Declaration of Trust, and

Whereas, Phillips & Hambaugh Realty & Construction Company, are entitled to a certain portion of monies collected on the aforementioned Contracts executed by the Pan American Bank of California, which apportionment is set out in Exhibit "E", attached hereto and made a part of this Declaration of Trust.

Now, Therefore, the Trustee hereby certifies and declares that it holds and will hold such title to the Trust property hereinbefore described, as has actually been conveyed to it in Trust, together with such other real and/or personal property which by the terms of this Trust may be conveyed or transferred to the Trustee with power of sale, for the following uses and purposes and subject to the terms, conditions, Trusts, covenants and agreements herein contained, to which the Trustor, Beneficiary, First Payee and Second Payee, by their written approval

(Citizens's Bank Exhibit No. 4)

and ratification of this Trust, agree to bind themselves, their heirs, successors and assigns, as though fully and directly made parties hereto.

ARTICLE I

SCOPE OF TRUST

To provide generally for the subdivision, improvement, liquidation and sale of the hereinbefore described real property and the collection and disbursement of the proceeds of such sale or sales and specifically:

1. To secure to the party of the first part, as Trustee, all fees, commissions and advancements made under the terms of this Declaration of Trust.

2. To secure the payment of the indebtedness of the Trustor to the Pan American Bank of California, in the sum of - - - - - Forty Five Thousand - - - - - and no/100 - - Dollars, and interest thereon, together with any renewal and/or renewals and/or extensions thereof.

3. To secure to the Second Payee, that portion of monies as described in Exhibit "E" from the collections on the respective Contracts as described in Exhibit "E".

4. To secure to the Beneficiary, its share of the proceeds of the sale of the Trust property, as hereinafter set forth.

(Citizens's Bank Exhibit No. 4)

ARTICLE II

POWERS OF TRUSTEE

In order to carry out the provisions of this Trust, the Trustee may do and perform the following:

1. The Trustee is hereby authorized to act upon the written order and direction of the Beneficiary relative to the management of the affairs of this Trust and the Trust property so far as such instructions may be consistent with the rights of the other parties under this Trust and which instructions shall be in full and complete acquittance of the Trustee of all liability or responsibility hereunder.

2. The Trustee is authorized to execute such Map or Maps for the subdivision of the Trust property and to dedicate and grant to public use any and all roads, streets and alleys shown on said Map or Maps and to convey and grant any and all easements and any and all rights of way which may be reasonably required when so directed to do by the Beneficiary and/or Trustor.

3. The Trustee is authorized to sell any of the hereinbefore described real property upon the written order of the Beneficiary, or upon the written order of any agent and/or agents appointed by said Beneficiary and to convey or contract to convey at such prices as said Beneficiary may direct, provided that:

(a) No Lot or Parcel shall be sold for less than the price listed in the schedule of minimum selling prices to be established by the Beneficiary and approved by the Trustee and First Payee, the total of

(Citizens's Bank Exhibit No. 4)

which schedule shall not be less than Two Hundred Ninety Five Thousand and no/100 (\$295,000.00) Dollars;

(b) All Contracts of Sale and/or Notes secured by Deeds of Trust given in settlement of the purchase price of the respective property shall be made in consideration of a payment in cash of not less than Fifteen (15%) Per Cent of the selling Price of the respective Lot and shall provide that the balance of the principal shall be paid at the rate of not less than One and One Half (1½%) Per Cent of the selling price per month, or at the same rate per month, payable quarterly, semi-annually or annually, together with or including interest on all deferred payments at a rate of not less than Seven (7%) Per Cent per annum, provided, however, that the total purchase price shall be paid in full prior to four (4) years from the date of the Contract of Sale.

(c) That the form, terms and conditions of all Contracts of Sale and/or Deeds issued by the Trustee covering any of the hereinbefore described property shall be similar to the form attached to this Declaration of Trust.

4. To receive, receipt and disburse, the collections and proceeds arising from the sale of the Trust property in accordance with the terms of this Declaration of Trust.

(Citizens's Bank Exhibit No. 4)

5. To enforce at the written request of the Trustor and/or First Payee and/or Trustee, the terms, conditions and covenants, including cancellation for default by act or suit of the various and several Contracts and/or Deeds of Trust which may be executed as herein authorized.

6. Upon the payment in full of any Contract, to execute a Deed and to furnish Guarantee of Title, showing the property covered thereby vested in the Seller, or its successor in interest, free and clear of all incumbrances, made, done or suffered by the Seller, subject, nevertheless, to such incumbrances as may be assumed by the Purchaser under said Contract and subject also to restrictions, easements and reservations and rights of way of record.

7. The Trustee is authorized at the expense of the Trust Estate, to have maintained by a reliable title company, the County and City Lien Tax Service.

8. The Trustee may loan or advance its own funds for any purpose connected with the operation, management, protection and/or improvement of the Trust property and/or the administration of this Trust, each of which loans and/or advancements, together with interest thereon at the rate of Seven (7%) Per Cent per annum, shall constitute a first lien on the entire Trust Estate, both principal and interest and be repaid prior to any other payments or distributions hereunder, provided, however, that all such loans and/or advancements, except those made for the payment of taxes and assessments, shall be subject to the rights of the first Payee.

(Citizens's Bank Exhibit No. 4)

ARTICLE III

APPLICATION OF FUNDS

All monies received by the Trustee on account of the sale of any of the Trust property shall be applied by said Trustee, so long as there is no default hereunder, in the following order of priority, to-wit:

1. To pay to Phillips & Hambaugh Realty & Construction Company, as Second Payee, the amount accruing to said Second Payee as shown by Exhibit "E", attached hereto, said amounts shall be paid only from principal collections on the respective Contracts as described in Exhibit "E".

2. To pay to the Beneficiary, or such agent or agents as may be appointed by said Beneficiary, as commission and operating expense, an amount not to exceed Thirty (30%) Per Cent of the sales price of all Lots sold after the date of this Declaration of Trust, said amounts shall be paid from the funds received by the Trustee as payment on the sales price of the respective Lot or Parcel.

3. To pay to the Pan American Bank of California, as First Payee, all subsequent collections received by the Trustee on account of the principal of the sales price of all Lots sold, until there shall have been paid to said First Payee, the amount of the release price of the respective Lot or Parcel, as shown in a schedule of Release Prices set forth in Exhibit "F", attached hereto and made a part of this Declaration of Trust, or until all sums due said First Payee, together with interest thereon, shall have been paid in full.

(Citizens's Bank Exhibit No. 4)

4. All other monies received by the Trustee on account of the sales price of all Lots sold, shall be deposited by the Trustee in a General Account and be disbursed in payment of the following:

(a) To the fees, commissions and advancements of the Trustee under the terms of this Declaration of Trust.

(b) To the payment of taxes, assessments and such other liens or incumbrances as the Trustee may deem necessary to be paid for the protection of the Trust property, but the Trustee shall not be responsible for a failure to pay such obligation, unless requested in writing so to do and properly indemnified therefor and shall not be responsible for a failure to pay such obligation unless such failure is due to its gross or willful neglect, but the Trustee may without such authorization, at its option pay such obligations.

(c) To pay the expense of Guarantees of Title, escrow fees, recording, acknowledgment and other administration fees in connection with the sale of the Trust property.

(d) To the payment of all counsel fees necessary for the protection of the Trustee and/or the Trust property.

(e) To the payment of all interest due the Pan American Bank of California.

(f) To the payment of the cost of the installation of improvements on the Trust property.

(Citizens's Bank Exhibit No. 4)

(g) To the payment of all items which in the discretion of the Trustee are necessary for the administration of this Trust and/or the protection of the Trust property.

5. All monies received by the Trustee in payment of interest on the unpaid portion of the sales price of any of the Trust property shall be disbursed by the Trustee as follows:

(a) To Phillips & Hambaugh Realty & Construction Company, the amount earned and paid on their equity as shown by Exhibits "B" and "E".

(b) The remainder to be deposited in the General Fund and used in payment of the items as shown by Paragraph 4 of this Article.

6. Any sums remaining in the hands of the Trustee, after first deducting the amounts necessary for the payment of all of the items shown in the preceding Paragraphs of this Article, shall be disbursed to the Beneficiary.

ARTICLE IV

OBLIGATIONS OF BENEFICIARY

It shall be the duty of the Beneficiary:

1. To proceed with all due diligence to sell the unsold portions of the Trust property upon the terms and conditions herein provided.

2. The Beneficiary undertakes, covenants and agrees that it will enter upon and proceed to complete or cause to be completed, in good faith and with reasonably dili-

(Citizens's Bank Exhibit No. 4)

gence, at its own cost and expense, all and within the boundaries of the Trust property, the work and improvements necessary for the sale of the Trust property, and before proceeding with such improvement, said Beneficiary shall deposit with the Trustee, such assurance as said Trustee may require, for the payment of said improvements.

3. The Beneficiary covenants and agrees to deposit with the Trustee, all sums necessary for the payment of items shown in Article III of this Declaration of Trust, in the event the funds in the hands of the Trustee are insufficient to pay same.

4. The Beneficiary shall have the privilege of retaining possession of the said Trust property and to have the management and control of the same, so long as there is no default hereunder, subject, however, to all the terms and conditions of this Trust and may for the purpose of making sale of Lots, select and employ such agent or agents, or subagents as it may deem necessary, if same are not objectionable to the Trustee, but any such agent, agents or sub-agents so employed by the Beneficiary shall be the agent of the Beneficiary and not of the Trustee, the First Payee, or the Second Payee, and neither the Trustee, First Payee or Second Payee, shall be liable or bound by any act of such agent or agents, unless specifically authorized by it nor for any wrong-doing, misappropriation or misconduct by such agent or sub-agents, neither the Beneficiary, nor his agent or sub-agents shall make any misrepresentations of any kind or character in connection with the sale of any Lots and in the event of

(Citizens's Bank Exhibit No. 4)

any misrepresentation being made, either by the Beneficiary or his agent or sub-agents, the Beneficiary assumes full responsibility and liability therefor, and agrees to hold the Trustee, First Payee and Second Payee, harmless and free from all liability.

ARTICLE V

MISCELLANEOUS PROVISIONS

1. The Trustee shall not be required to advance any money or to incur any personal liability in or about the protection of the Trust property or in respect to any of the Contracts to be made by it hereunder, (except for the liability to account for money coming into its hands) as herein contemplated. Any advancements herein provided to be made by the Trustee and any personal obligation which it may hereunder incur for advancements out of its personal or private funds, shall be at all times taken as optional upon its part and in no respect obligatory.

2. The Beneficiary hereunder shall be entitled in the event of any legal action being brought by the Trustee herein for the enforcement of Contracts executed under this Trust, to select and nominate any reputable attorney to represent the Trustee provided that wherever any such action is brought pursuant to this Trust in the name of the Trustee, the Trustee before bringing such action or authorizing its name to be used therein, shall be entitled to require from the Beneficiary and/or Trustor, reasonable and satisfactory security to protect it against costs or liabilities incurred in and about such action.

3. The Trustee shall not be liable to the Beneficiary or otherwise, for the misconduct, malfeasance or misap-

(Citizens's Bank Exhibit No. 4)

appropriation of any attorney, agent, or representative selected by it upon the nomination or request or the Beneficiary under the terms of this Trust, except where such agent or attorney may act upon the express authorization of the Trustee and without the authority of the Beneficiary and/or Trustor.

4. The Trustee shall be entitled to reimburse itself from the Trust funds on hand, in the General Account, for any costs, fees or advancements made by it, which may be authorized under the terms of this Trust, if such costs, fees or advancements are not repaid to it upon demand.

5. The Trustee in case of any default hereunder of the Beneficiary after notice shall be entitled to suspend compliance with all requests of the Beneficiary.

6. It is also understood and agreed that the parties hereto will not directly or indirectly solicit the leasing of oil rights or promote the sale of oil units or any oil interests pertaining to any part or parts of the Trust property while title thereto is vested in the Trustee, without the consent of Trustee, Beneficiary and/or Trustor.

7. The Beneficiary agrees that he will fully indemnify and hold harmless the said Trustee of and from any and all damages, expenses, costs, attorney's fees or other liability or obligation that it may incur arising out of or in connection with its duties as Trustee hereunder.

8. No sale or transfer of any beneficial interest hereunder shall be valid or binding on said Trustee until the Instrument making such assignment shall be accepted by and deposited with the Trustee, excepting only where such interest may pass or be transferred by decree, order or

(Citizens's Bank Exhibit No. 4)

judgment of a court of competent jurisdiction, and then only upon proof satisfactory to the Trustee of the legality and validity of the proceedings on such matter being presented to said Trustee.

9. If the property herein described, or any portion thereof, becomes liable for the payment of any tax, assessment or lien, or if the proceeds or avails from such property become liable for any inheritance, income or other tax, said Trustee is authorized to withhold and pay such tax out of the monies in its hands for the account of the party liable for such tax. And if any such tax be not paid by said party liable for such tax, or by someone else on his behalf, and there are not sufficient monies in the hands of the Trustee under the above Trust, the Trustee may at its option (but it shall not be obligated so to do) advance a sufficient sum to pay such tax, which advance with interest thereon at the rate of Seven (7%) Per Cent per annum from the date of the advancement to the date of repayment shall constitute a first lien on the property covered thereby, if said payment is of taxes, assessments or liens upon or against said property, or shall constitute a first lien on interest in said Trust to the party of the second part for whose account said monies have been paid.

10. The Trustee shall not be required to attend to or procure any insurance upon any building upon any property covered hereby, but all such services shall be performed and the expense thereof borne by the Beneficiary.

11. The Trustee shall not be required to commence or defend any suit or suits with respect to said property

(Citizens's Bank Exhibit No. 4)

covered hereby, unless requested to do so in writing by the Beneficiary and/or Trustor and properly indemnified therefor.

12. It is understood that the Trustee may amend any, and/or all of the terms, and conditions of this Trust upon request being made in writing by all parties having interest in this Trust at the time such amendment is requested.

13. Any notices herein required to be given or furnished to the Beneficiaries shall be in writing and delivery of such written notice to the Beneficiary shall be conclusively taken as such, if and when left at or deposited in the United States mail, registered, postage prepaid and addressed to the Beneficiary at Los Angeles, California.

14. Nothing herein contained shall be construed as constituting a partnership between the Beneficiary and/or Trustor, the Trustee, the First Payee and the Second Payee, or any of them.

15. Time is the essence of this Agreement and full performance by the Beneficiary of all its obligations hereunder, is and shall be a condition precedent to its rights to the benefits of this Declaration of Trust.

ARTICLE VI

POWER OF SALE

If one or more of the following events herein called events of default, shall happen, that is to say:

1. If default shall be made in the payment of interest due the Pan American Bank of California, as and when the same shall become due and payable;

(Citizens's Bank Exhibit No. 4)

2. If default shall be made in the payment of principal of the obligation due the Pan American Bank of California, as and when the same shall become due and payable; or

3. If default shall be made in the payment to the Trustee of any advances made by the Trustee and such default shall continue for a period of thirty days; or

4. If default shall be made in the due observance or performance of any other covenant or condition herein to be kept or performed, by the Beneficiary and/or the Trustor, and such default shall continue for a period of thirty days,

Then and in each such case, the Trustee may, and upon the written request of the First Payee, shall declare all obligations in favor of the Pan American Bank of California, and/or the Citizens National Trust & Savings Bank of Los Angeles, together with interest thereon, due and payable and proceed to sell to the highest and best bidder, such portion of, or all of the Trust property, as in its discretion it may deem necessary or proper, in one or more or all of the manners and methods hereinafter set forth;

1. In the event of default and the election of the Trustee to sell, and/or upon the receipt of Declaration of Default and Demand for Sale, as hereinbefore provided, the Trustee shall, without unnecessary delay, record in the Office of the Recorder of Los Angeles County, a notice of such breach and of the election to cause said property to be sold to satisfy said obligation. The acceptance of any sum or sums secured hereby, principal or interest, after

(Citizens's Bank Exhibit No. 4)

the same becomes due and payable, or the performance of any or all obligations herein mentioned, shall not operate as a Waiver of the right to insist upon the payment when due of all other sums secured hereby and the performance of any or all other obligations herein mentioned and to declare default and proceed with the sale under this Declaration of Trust.

2. After three months shall have elapsed following the recordation of said Notice of Breach, the Trustee without demand, shall sell said property in such Parcels and at such times and places as it shall deem best to accomplish the objects of these Trusts, having first given notice of the time and place of such sale or sales, in the manner and for a time not less than that required by law for sales of real property upon the execution and under Deeds of Trust.

The Trustee may from time to time postpone the sale of all or any portion of said property by the publication, prior to the date of sale so advertised, of a notice of postponement in the same newspaper or newspapers in which the original notice of sale was published, or by public announcement thereof at the time and place of sale so advertised or postponed.

Such sale or sales shall be made in the following manner, namely:

At the time and place of sale fixed as hereinbefore provided, the Trustee may sell the property so advertised, or any portion thereof, either en masse or in separate Parcels at its own discretion at public auction, to the highest and best bidder for cash, in gold coin of the

(Citizens's Bank Exhibit No. 4)

United States, and after any such sale and due payment made, shall execute and deliver to the purchaser or purchasers, a Deed or Deeds or other appropriate Instruments conveying the property so sold to such purchaser or purchasers, but without covenant or warranty, express or implied, regarding the title or incumbrances, whereupon such purchaser or purchasers shall be let into immediate possession of said property, and all other persons in possession thereof shall be deemed to be tenants at sufferance and the recitals, in any such Deed, of any facts or matters affecting the regularity or validity of such sale, shall be conclusive proof of the truthfulness of such recitals, and such Deed shall be conclusive against all persons as to all matters therein recited. The Trustee as well as the Beneficiary or any representative, heir or successor, as well as any other person or party, or any person acting on behalf of either or all or any of them may purchase at such sale. The purchaser under such foreclosure sale shall be entitled to and shall receive the following and only the following:

(a) Title to all Lots not previously deeded and not sold under Contract at the date of the Declaration of Default;

(b) The proceeds which would have accrued to the benefit of this Trust and to the Beneficiary hereunder, in the event that there had been no default in any of the terms of this Instrument, arising from all Lots and Parcels of real estate sold hereunder. Provided, however, that in the event of the release of the contract lien on any Lot or Parcel of real estate (1) by cancellation of the contract, other than can-

(Citizens's Bank Exhibit No. 4)

cellation for the purpose of issuing Deed, or: (a) by suit to quiet title, the title to said Lot shall vest as in (a) supra by issuance of conveyance running from the Trustee hereunder to the purchaser under said Foreclosure Sale.

3. The Trustee out of the proceeds of such sale or sales shall pay in the following order:

(a) The expense of such sale, including the posting and advertising, together with cost, fees, charges and expenses of this Trust and in addition thereto, the Trustee's fee for making such sale.

(b) All such sums which have been paid or advanced by the Trustee in accordance with the provisions hereof, or by reason of the acceptance and execution of this Trust, which have not been repaid, including its compensation, costs and expenses, with accrued interest, if any, as hereinbefore provided.

(c) The amount due, owing or unpaid to the Pan American Bank of California, with accrued interest thereon.

(d) The amount necessary to complete the payment of the installation of all improvements on the Trust property.

(e) All sums necessary for the protection of the Trust property.

(f) The balance of the proceeds, if any, to the person and/or persons, and/or corporation, and/or corporations, legally entitled thereto.

(Citizens's Bank Exhibit No. 4)

4. In the event of default, sale and conveyance of the Trust property or any portion thereof, as hereinbefore in this Article provided, it is agreed that the title to any real property covered by any then existing Agreements of Sale executed by the Trustee and/or Pan American Bank of California, shall remain in the name of the Trustee for the sole use and benefit of the purchaser or purchasers at such sale or sales and the proceeds received from the collection on said Contracts shall be applied by the Trustee for the benefit of said purchaser or purchasers with the right in the Trustee to deduct from such collections its necessary expenses and the fees for such collections as provided in Article IX hereunder.

5. In addition to the right and power herein given to the Trustee of selling the Trust property upon default as herein above provided, the Trustee may, and it is hereby empowered so to do, immediately upon the happening of any such default, cease to pay any of the proceeds in its hands or which may come into its hands under this Trust, to the Beneficiary and/or Second Payee and may thereupon and thereafter apply all such proceeds, first to the payment of costs, fees and expenses of this Trust and of the expenses of the Trustee in the maintenance of the Trust property and any remainder to the payment of the balance then unpaid on that certain obligation due the Pan American Bank of California, hereinbefore mentioned, until all defaults have been remedied. It is understood and agreed that the right of the Trustee to apply such monies, shall be an additional and cumulative remedy for the protection of the Pan American Bank of California, and none of the remedies herein given shall be

(Citizens's Bank Exhibit No. 4)

exclusive of any other remedy, that any of the parties hereto may have for the enforcement of any rights conferred under this Trust.

ARTICLE VII

TERMINATION OF TRUST

1. This Trust shall continue to and until the sale and/or disposition in fee of all the property subject to this Trust and the distribution of all proceeds thereof, in accordance with the terms hereof, or until terminated by written direction to the Trustee, signed by all parties in interest, or until the date of the death of the last to die of the following named persons: Edmond B. Tracy, Ann Louise Tracy and Carmen Lilian Gould, whichever event shall happen first. In the event that this Trust shall for any reason terminate prior to the sale and disposition in fee of all the property subject to this Trust and the distribution of all proceeds thereof, then the Trustee shall convey the whole of the Trust Estate, subject to all then existing easements, incumbrances and/or other matters affecting title, as directed by the parties at interest, provided, however, that all fees, charges, advances and expenses then due the Trustee hereunder shall be fully paid and further provided, in no event shall the Trustee be required to convey from under this Trust, any property then subject to Contracts of Sale, unless the Trustee shall in a manner wholly satisfactory to it, be wholly relieved and discharged from any and all then existing obligations and liabilities under such Contracts of Sale.

(Citizens's Bank Exhibit No. 4)

2. The Trustee may resign and discharge itself of the Trust hereby created by a written notice to all parties then having an interest in this Trust, thirty days before such resignation shall take effect. A successor may thereupon be appointed by an Instrument in writing executed by said *interest* parties and accepted by the successor Trustee. Should said interested parties fail to make such appointment before the expiration of such thirty day period, the Trustee may thereupon appoint a temporary successor Trustee to fill such vacancy until such successor be appointed by said interested parties.

Any Trustee appointed shall be a trust company authorized to act as Trustee in the State of California, if there be such a trust company willing to qualify and able to act and such Trustee so appointed shall execute, acknowledge and deliver to the Trustee hereunder, a written Instrument accepting such appointment and thereupon the successor Trustee, without further action on its part, shall become fully vested with all the estates, rights, powers and duties conferred upon the Trustee hereunder.

ARTICLE VIII

COMPENSATION

The Trustee shall be entitled to the following compensation for its services in or about the performance of this Trust:

1. Acceptance fee of (\$300.00) Three Hundred Dollars.
2. Annual fee: The fees of the Trustee during each and every year during the term of this Trust, with the

(Citizens's Bank Exhibit No. 4)

exception of the acceptance fee, shall equal or exceed Three Hundred and no/100 (\$300.00) Dollars.

3. Collection fees—

(a) Cash sales—Two (2%) Per Cent of the sales price.

(b) Deferred Sales—Collections less than \$15.00 Five (5%) Per Cent of the amount of such collection.

(c) Deferred Sales—Collections \$15.00 or more—Three (3%) Per Cent of the amount of such collection.

4. Executing Contracts in duplicate—\$2.50 each.

5. Executing Deeds—\$2.50 each.

6. Accepting and registering Assignments of Contracts—\$2.50 each.

7. Transfers of beneficial interest—\$5.00 each.

8. Appearance in Court by Trustee as witness—Minimum—\$10.00 for each one half day.

9. Disbursing funds for improvements—1/2 of One (1%) Per Cent of the amount disbursed.

10. Closing or distribution fee—1/2 of unearned fees on a basis of cash sales.

11. Reasonable compensation for any services not heretofore specified.

The terms and conditions of this Trust shall inure to the benefit of and bind the successors and assigns of the parties hereto.

In Witness Whereof, the Citizens National Trust & Savings Bank of Los Angeles, has caused its name to be subscribed and its seal to be fixed hereto, by its Vice

(Citizens's Bank Exhibit No. 4)

President and Assistant Trust Officer, thereunto duly authorized, the day and year first above written.

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES

By Holcott P. Thomas

[Seal] Vice President

By P. W. Slater

Assistant Trust Officer

Los Angeles, California.

Dec. 2nd 1929.

The undersigned, Farm Home Builders Incorporated, a Corporation, hereby certifies that it is the party named in the foregoing or attached Declaration of Trust as the Trustor and/or Beneficiary and party of the second part; that said Declaration fully and correctly sets out and discloses the terms, conditions and Trusts under and upon which the property described herein is to be held and disposed of by the Trustee named therein, and the undersigned hereby approves, ratifies and confirms said Declaration in all its parts. The said second party by the execution of this Instrument does hereby undertake and agree with the Trustee to be bound by all of the conditions, obligations and the terms thereof, so far as they fix its rights and duties.

FARM HOME BUILDERS INCORPORATED

By F. D. Hall

[Seal] President

By Erwin S. Hall

Secretary

(Citizens's Bank Exhibit No. 4)

Los Angeles, California,
Dec. 2nd 1929.

The undersigned, Pan American Bank of California, a Corporation, hereby certifies that it is the party named in the foregoing or attached Declaration of Trust as the First Payee, and party of the third part; that said Declaration fully and correctly sets out and discloses the terms, conditions and Trusts under and upon which the property described herein is to be held and disposed of by the Trustee named therein, and the undersigned hereby approves, ratifies and confirms said Declaration in all its parts. The said third party by the execution of this Instrument does hereby undertake and agree with the Trustee to be bound by all of the conditions, obligations and terms thereof, so far as they fix its rights and duties.

PAN AMERICAN BANK OF CALIFORNIA

By E. Hill

[Seal]

Vice President

By A. Q. Robison

Assistant Secretary

Approved:

M M Ewing

M. M. EWING, as Special Deputy Superintendent of Banks of the State of California, in Charge of Liquidation of said Pan American Bank of California.

(Citizens's Bank Exhibit No. 4)

Los Angeles, California.
Dec. 2nd 1929.

The undersigned, Phillips & Hambaugh Realty & Construction Company, a Corporation, hereby certifies that it is the party named in the foregoing or attached Declaration of Trust as the Second Payee and party of the Fourth Part; that said Declaration fully and correctly sets out and discloses the terms, conditions and Trusts under and upon which the property described herein is to be held and disposed of by the Trustee named therein, and the undersigned hereby approves, ratifies and confirms said Declaration in all its parts. The said Fourth Party by the execution of this Instrument does hereby undertake and agree with the Trustee to be bound by all of the conditions, obligations and terms thereof, so far as they fix its rights and duties.

PHILLIPS & HAMBAUGH REALTY &
CONSTRUCTION CO.

By Bert Bane

[Seal]

President

By H. Grimshaw

Secretary

* * * * *

U. S. District Court, No. 41731 P.H. Citizens Bank Exhibit No. 4 for iden. Filed 9-27-43. H. Sidney Laughlin, Conciliation Commissioner.

[Endorsed]: Filed Jun. 7, 1946. Edmund L. Smith, Clerk.

[DEBTOR'S EXHIBIT NO. 2-4 (Portion Only)]

Trust Department

CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

Statement

Trust Name FARM HOME BUILDERS, INC

Trust No. 5873 Trust Account RECAPITULATION From 1/1/40 To 12/31/40 I

COLLECTIONS:

Interest	\$ 218.17	
Principal	1,400.06	\$1,618.23
	<hr/>	

DISTRIBUTIONS:

General Trust Account		
Interest	\$218.17	
Principal	199.83	\$ 418.00
Pan American Bank,*		
Release Account	1,200.23	
F. D. Hall, Agent	—0—	\$1,618.23
	<hr/>	

*The Pacific States Corporation
since 11/2/39

Debtor's Exhibit No. 2-4)

Trust Department

CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

Statement

Trust Name FARM HOME BUILDERS, INC

Trust No. 5873 Trust Account COLLECTIONS From 1/1/40 To 12/31/40 Incl.

Parcel Lot	From	To	Interest	Principal	Contract Balance	Principal Distributed To:		
						General Trust	Release	F. D. Hall Agent
F	12/ 1/39	12/ 1/40	\$ 1.77	\$ 16.23	\$ 14.77	\$ 1.23	\$ 15.00	\$
D&E	3/28/39	8/28/40	9.48	15.00	85.00		15.00	
N&O	4/ 2/39	9/ 2/40	9.48	15.00	85.00		15.00	
B	1/ 1/40	10/ 1/40	1.13	40.00	—0—		40.00	
B	12/ 7/39	9/18/40	2.14	69.24	—0—	3.20	66.04	
A & A	12/15/39	12/15/40	12.17	107.83	114.59	5.41	102.42	
E-F-G-H-I	12/15/39	12/16/40	5.17	97.84	—0—	97.84		
B&C	12/18/39	12/18/40	13.18	118.82	122.95		118.82	
E	11/20/39	11/15/40	17.72	36.28	218.72	6.28	30.00	
C	12/18/39	12/18/40	9.04	74.96	88.19		74.96	
D	12/18/39	12/18/40	8.96	75.04	86.57		75.04	
B	11/15/39	11/15/40	5.49	31.66	59.45	6.70	24.96	
C	10/15/39	10/15/40	4.69	59.31	29.83	45.17	14.14	
B	12/15/39	10/23/40	3.65	88.85	—0—	34.00	54.85	
C-D-E-F	10/24/39	10/24/40	17.85	54.00	205.31		54.00	
acres	12/ 7/39	12/ 7/40	96.25	500.00	1,000.00		500.00	
			\$218.17	\$1,400.06	\$2,110.38	\$199.83	\$1,200.23	\$

Total Contracts on which no

cash pay'ts received in 1940

\$30,180.66

\$32,291.04

Total Balance of Outstanding Contracts

\$31,291.04

Trust Deed Note

1,000.00

\$32,291.04

500 Trust Deed Note executed by Paul J. Marache,

payable \$250 semi-annually, plus interest at 7%.

Unpaid balance due 12/7/42. Covering 70 acres,

lying all of SW¼ of Sec. 2, T. 6 N., R. 14 W.

(Accepted in lieu of Land Contract) Bal. 12/31/40 \$ 1,000.00

(Debtor's Exhibit No. 2-4)

Trust Department

CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

Statement

Trust Name FARM HOME BUILDERS, INC

Trust No. 5873 Trust Account GENERAL TRUST ACCOUNT From 1/1/40
12/31/40 Incl.

<u>1940</u>		<u>Disbursements</u>	<u>Recei</u>
1/ 1	Balance per previous statement		\$ 17
4	Mailing contract notices for December	\$ 1.65	
11	Paul J. Marache—New Owner Fee —1939-40 taxes		6 13
2/15	Mailing notices for January	2.40	
3/ 2	Mailing notices for February	1.35	
5/24	Title Insurance and Trust Co.—Order on portion Sec. 2, T 6 N, R 14, S. B. B. & M.—Marache	212.00	
7/ 6	Record notice of breach	4.70	
16	Pacific States Corporation—Advance account foreclosure of trust Los Angeles County Tax Collector—Pay't of delinquent taxes on parcels of property	50.00	100
17	Los Angeles County Tax Collector—1st pay't on Five- Year Tax Plan	17.05	
23	Mailing notices for March, April, May and June	6.00	
24	County of Los Angeles—Refund under dep. of \$50 account pay't of delinquent taxes under Five-Year Plan		37
8/ 8	H. L. Byram—To redeem portion Lot 56, Tr. 5148 —portion Lot 34	19.42 21.60	
21	Registered mail expense sending notice of breach to F. D. Hall, Palmdale, California	.21	
9/ 6	Mailing notices for July and August	1.50	
28	Execution of deed S 180' of N 360', Lot 53, Tr. 5148— Kutschke	2.50	
10/ 9	Mailing notices for Sept.	.75	
14	Delinquent taxes—Lot 33, B, Tr. 5148—Kutschke		10
19	Telephone call to Ledger Gazette at Lancaster re publi- cation of Trustee Sale	.45	
23	Execution of deed—Pt. Lot 24, Tr. 5148—Fischer	2.50	

Debtor's Exhibit No. 2-4)

Trust Department

CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

Statement

Debtor Name FARM HOME BUILDERS, INC

Trust No. 5873 Trust Account GENERAL TRUST ACCOUNT From 1/1/40 To 12/31/40 Incl.

		Disbursements	Receipts
29	Revenue Stamp—Pt. Lot 24, Tr. 5148—Fischer	\$.55	
	Revenue Stamps for deed—Lot 33, Tr. 5148—Kutschke	2.20	
1	Title Insurance and Trust Co.—Order on portion Lot 24, Tr. 5148—Fischer	26.06	
	Title Insurance and Trust Co.—Order on portion Lot 33, Tr. 5148—Kutschke	22.68	
6	Registered mail expense sending notices of Trustee Sale to Farm Home Builders, Palmdale—and F. D. Hall	.42	
29	First half 1940-41 taxes—Pt. Lot 24, Tr. 5148—Fischer		\$ 1.12
6	H. L. Byram—First half 1940-41 taxes:		
	Ptn. Lot 24 of Tr. 5148	\$2.23	
	“ “ 34 “ “ “	1.86	
	“ “ 43 “ “ “	2.79	
	“ “ 56 “ “ “	3.53	
	“ “ 56 “ “ “	1.67	
	12.5 acs.—N½ of NW¼ of S. 13, T 6 N, R. 14	1.30	13.38
	H. L. Byram—Amt. to redeem E. 15 acs., Range 14	24.89	
30	In payment of delinquent taxes Lot H (B), Tr. 5148—Davies		1.51
31	By Suspense Account—To apply on delinquent taxes—Davies Collections applicable to this account for the period 1/1/40 to 12/31/40, incl.:		2.50
	Interest	\$218.17	
	Principal	199.83	418.00
		\$ 434.26	\$ 608.66
	Cash Balance 12/31/40	174.40	
		\$ 608.66	\$ 608.66

(Debtor's Exhibit No. 2-4)

Trust Department

CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

Statement

Trust Name FARM HOME BUILDERS, INC

Trust No. 5873 Trust Account MEMORANDUM OF FEES DUE TRUSTEE From
1/1/40 To 12/31/40 Incl.

Balance owing for 1938		\$ 150.
Minimum for 1939	\$ 300.00	
Less fees for execution of deeds, and contracts, mailing notices, etc.	51.45	248.
	<hr/>	<hr/>
		\$ 398.
Less credit due Trustor on fees		164.
		<hr/>
		\$ 233.
Minimum for 1940	\$ 300.00	
Less fees for execution of deeds and mailing notices	18.65	281.
	<hr/>	<hr/>
Balance due Trustee		\$ 515.

Debtor's Exhibit No. 2-4)

Trust Department

CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

Statement

Trust Name FARM HOME BUILDERS, INC

Trust No. 5873 Trust Account as indicated From 1/1/40 To 12/31/40 Incl.

PAN AMERICAN BANK—RELEASE ACCOUNT

	<u>Disbursements</u>	<u>Receipts</u>
1 Balance per previous statement		\$1,264.08
23 Citizens National Bank, as Trustee under its Trust PT-5902—funds available 12/31/39 to apply on principal of Farm Home Builders note	\$1,264.08	
Collections applicable to this account for the period 1/1/40 to 12/31/40		\$1,200.23
	\$1,264.08	\$2,464.31
Balance December 31, 1940	\$1,200.23	
	\$2,464.31	\$2,464.31

STATEMENT OF RELEASE OBLIGATION IN FAVOR OF PAN AMERICAN
BANK: (Now THE PACIFIC STATES CORPORATION)

Unpaid balance 12/31/39		\$25,549.45
5/23/40 Paid a/c principal	\$1,264.08	
*6/29/40 Paid a/c principal	363.85	1,627.93
(a/c interest \$363.85)		
Unpaid Balance 12/31/40		\$23,921.52

*Paid direct to Supt. of Banks,
by F. D. Hall 8/23/37 per memo
H. Chamberlin 6/28/40

(Debtor's Exhibit No. 2-4)

Trust Department

CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

Statement

Trust Name FARM HOME BUILDERS, INC

Trust No. 5873 Trust Account as indicated From 1/1/40 To 12/31/40 Incl.

F. D. HALL, AGENT

<u>1940</u>	<u>Disbursements</u>	<u>Recei</u>
1/ 1 Balance per previous statement		\$ — 0

NO ACTIVITY IN THIS ACCOUNT DURING THIS PERIOD

ADDITIONS TO CONTRACTS

7/26/40	1939-40 taxes added to Lot 61-B, Tract 5148—Maddox	\$ 1
12/12/40	1939-40 taxes added to Lots H, C-F, Section 13—White	4
		\$ 5

U. S. District Court No. 41731-PH. Debtor's Exhibit No. 2
(Portion only). Filed 8-12-43. H. Sidney Laughlin, Conciliator
Commissioner.

[Endorsed]: Filed Jun. 7, 1946. Edmund L. Smith, Clerk.

No. 11527. United States Circuit Court of Appeals for the Ninth
Circuit. Filed Jan. 28, 1947. Paul P. O'Brien, Clerk.

[Endorsed]: No. 11527. United States Circuit Court of Appeals for the Ninth Circuit. Pacific States Corporation, a corporation. Appellant, vs. Frank D. Hall and Marguerite S. Hall, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed January 24, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Title of District Court and Cause]

PETITION FOR DISMISSAL

Comes now Pacific States Corporation, the sole Creditor herein, and files this its application for dismissal of the petition filed herein under Section 75 of the Bankruptcy Act, by Frank D. Hall and Marguerite S. Hall, and for grounds of such application does file the following specifications:

I.

That neither Frank D. Hall nor Marguerite S. Hall is a "farmer", as that term is defined in Section Seventy-five, Chapter VIII of the Bankruptcy Act (United States Code, Title II).

II.

That neither Frank D. Hall, nor Marguerite S. Hall, is the owner of any of the property particularly described in Schedule BI of the original petition filed herein as:—

"Ranch at Leona Valley, near Palmdale.

See photostatic description attached (Standing of record in the name of Citizens National Trust & Savings Bank, Trustee)

(Including water stock under Schedule B-2 (B))"

Wherefore, the said Creditor, Pacific States Corporation, prays that the petition herein be denied, and that these proceedings be terminated and dismissed.

PACIFIC STATES CORPORATION

By A. Q. Robison

Secretary

[Verified.]

[Endorsed]: Filed Jan. 14, 1943. Conciliation Commissioner.

[Title of District Court and Cause]

ORDER UPON PETITION FOR DISMISSAL

The petition for dismissal of the Pacific States Corporation coming on regularly to be heard on the 20th day of January, 1943, at the hour of 2:00 o'clock P. M. in Room 229, Federal Court House and Post Office Building, in the City of Los Angeles, County of Los Angeles, State of California, in the District and Division of the above entitled court, before the Honorable H. Sidney Laughlin, Conciliation Commissioner of Los Angeles County, and being heard on said day and on intermittent days thereafter to and including the 26th day of February, 1943, the petitioning creditor appearing by its secretary, A. Q. Robison and also by its attorney, Richard L. North, Esq., and the debtors appearing in person and by their attorney, C. P. Von Herzen, Esq., and evidence with respect to the issues created by said petition having been introduced and exhibits with respect thereto having been offered and introduced, and the cause having been argued, and the Commissioner having been fully advised in the premises and having taken said matter under advisement with an acknowledgement of a decision on the 5th day of March, 1943, at the hour of 2:00 P. M., and said decision having been announced by the Commissioner that he found said debtors, Frank D. Hall and Marguerite S. Hall, to be farmers within the meaning of Subsection (r) of Section 75 of the Bankruptcy Act, and also to be the owners of the real property described in the schedules attached to

their petition, ~~and the alter ego of Farm Home Builders Inc.,~~ [H.S.L.] and the written findings of fact and conclusions of law having been waived by the respective parties hereto, the Commissioner now makes his order as follows:

It Is Ordered and Adjudged that the petition for dismissal of the creditor, Pacific States Corporation, based upon the ground that the debtors, Frank D. Hall and Marguerite S. Hall, are not farmers, be and the same is hereby denied;

It is Further Ordered and Adjudged that the petition for dismissal of the creditor, Pacific States Corporation, based upon the ground that neither the debtors, Frank D. Hall nor Marguerite S. Hall are the owners of the real property particularly described in Schedule B-1 of the schedules of said debtors be and the same is hereby denied.

Dated May 18th, 1943.

H. SIDNEY LAUGHLIN

Commissioner

[Endorsed]: Filed May 11, 1943. Conciliation Commissioner.

[Title of District Court and Cause]

PETITION FOR DISMISSAL

Comes now the Citizens National Trust & Savings Bank of Los Angeles, and presents this its application for dismissal of the petition filed herein under Section 75 of the Bankruptcy Act, and as grounds for such application alleges:

I.

Petitioner is a National Banking Association organized and existing under the laws of the United States of America and having its principal place of business in the City and County of Los Angeles, State of California.

II.

Petitioner is the owner of the real property referred to and described in Schedule B-1 of the original petition filed herein as:

Ranch at Leona Valley, near Palmdale.

See photostatic description attached (Standing of record in the name of Citizens National Trust & Savings Bank, Trustee) (Including water stock under Schedule B-2 (B))

and has at all times herein mentioned held title to the real property under the terms and provisions of a subdivision trust wherein petitioner and Farm Home Builders Incorporated, a corporation, Pan American Bank of

California, a corporation, and Hambaugh Realty & Construction Company, a corporation, are named as the interested parties.

III.

That neither of the above named debtors is the owner of any of the property hereinabove referred to, or any part or portion thereof, and any interest which they or either of them may have in said trust consists only of a right to receive proceeds therefrom if the terms and conditions of said trust have been performed and complied with and neither of said debtors has any present interest in the said property.

Wherefore, petitioner prays that the petition herein be denied.

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES

By N. E. Mudge, Vice President

Petitioner

DERTHICK, CUSACK & GANAHL

By W. J. Cusack

Attorneys for Petitioner

[Verified.]

[Endorsed]: Filed Sep. 14, 1943. Conciliation Commissioner.

[Title of District Court and Cause]

MOTION TO DISMISS

To the Debtors Above Named and To C. P. Von Herzen,
Their Attorney:

You and Each of You will please take notice that the Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, will move the above entitled court before Hon. H. Sidney Laughlin, Conciliation Commissioner, Room 227 Federal Building, Los Angeles, California, at 10 o'clock A. M. on the 27 day of Sept., 1943, or as soon thereafter as counsel can be heard, for an order dismissing the petition of the debtors on file herein. Said motion to be made on the ground that neither of said debtors is a farmer under the provisions of Section 75, Chapter 8 of the National Bankruptcy Act. Said motion to be based upon the affidavit of Oscar Horst-
and the testimony of Marguerite S. Hall received in
a prior hearing on 1-20, 1943 W.J.C. HSL
mann attached hereto, [^] upon the records and files in this cause and upon this notice of motion.

September 13, 1943.

DERTHICK, CUSACK & GANAHL

by W. J. Cusack

Attorneys for Petitioner

[Endorsed]: Filed Sep. 14, 1943. Conciliation Commissioner.

[Title of District Court and Cause]

NOTICE OF MOTION TO STRIKE FROM
PETITION AND SCHEDULES

To the Debtors Above Named and to C. P. Von Herzen,
Their Attorney:

You and Each of You will please take notice that the Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, will move the above entitled court before Hon. H. Sidney Laughlin, Conciliation Commissioner, Room 227 Federal Building, Los Angeles, California, at 10 o'clock A. M. on the 27 day of Sept., 1943, or as soon thereafter as counsel can be heard, for an order striking Schedule B-1 of the original petition on file herein, including the description of the real property therein referred to and the exhibits attached thereto describing said real property, and the water stock pertaining to said real estate described under Schedule B-2. Said motion to be based upon the ground that neither of said debtors is a farmer and upon the further ground that said debtors or either of them do not own said real property or any part or portion thereof. Said motion to be based upon the affidavit of Oscar Horstmann attached hereto, upon the records and files in this cause and upon this notice of motion.

September 13, 1943.

DERTHICK, CUSACK & GANAHL

By W. J. Cusack

Attorneys for Petitioner

[Endorsed]: Filed Sep. 14, 1943. Conciliation Commissioner.

[Title of District Court and Cause]

**SUBMITTED CORRECTIONS TO THE PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF
LAW HERETOFORE SUBMITTED BY AT-
TORNEY FOR DEBTORS H.S.L.**

The petition of the Citizens National Trust & Savings Bank of Los Angeles for dismissal of the pending proceedings, and the motion of said Citizens National Trust & Savings Bank to dismiss the petition of the debtors on file herein, and the motion of said bank to strike from the petition of the debtors on file herein, and the schedules attached thereto, the real property therein described and the water stock pertaining to said real property, as is set forth in Schedule B2, coming on regularly for hearing before the Honorable H. Sidney Laughlin, Conciliation Commissioner of Los Angeles County, in Room 227 Federal Building, City of Los Angeles, County of Los Angeles, State of California, in the above entitled Division and District of the above entitled Court, on the 27th day of September, 1943, the Citizens National Trust & Savings Bank of Los Angeles appearing by its counsel, Messrs. Derthick, Cusack & Ganahl, by William J. Cus-

H.S.L. and

ack, Esq., and the debtors appearing by ~~the~~ through their counsel, C. P. Von Herzen, Esq., Messrs. Goudge, Robinson & Hughes by Edgar F. Hughes and David A. Sondel, Esquires, and the creditor, Pacific States Corporation, appearing by its counsel, Richard L. North, Esq., and evidence with respect to the issues created by the said petition and motions having been offered and exhibits with respect thereto having been offered, and objections

and motion to strike certain testimony having been granted H.S.L. thereto sustained, \wedge and the Commissioner being fully advised in the premises now makes the following Findings of Fact with respect thereto:

I.

The Commissioner finds that some time prior to the filing of the petition and motions on behalf of the said Citizens National Trust and Savings Bank, a corporation, similar petitions were filed for and on behalf of a creditor of said debtors, namely, Pacific States Corporation, a corporation. Thereafter and prior to the hearing herein, the said petitions and motions of Pacific States Corporation were heard and at the conclusion thereof, an \wedge was on May 18th 1943 H.S.L. \wedge orders were made and entered herein \wedge denying said petitions and motions of said Pacific States Corporation, a corporation. The time allowed by law for a review of said orders has expired and said orders are now final.

II.

The Commissioner further finds that the petitioner herein, Citizens National Trust and Savings Bank, has no interest in the property involved in this proceeding, under certain trust indentures except as ~~an agent of and~~ as a trustee \wedge ~~for the said creditor, Pacific States Corporation,~~ and accordingly, H.S.L. as trustee the said Citizens National Trust and Savings Bank \wedge is bound by all proceedings heretofore taken by Pacific

States Corporation, a corporation, and the result thereof and the decisions therein.

As Conclusions of Law from the foregoing Findings of Fact, the Commissioner finds:

I.

That the ^{motions} ~~rights~~ of the Citizens National Trust and Savings Bank of Los Angeles, a corporation ^{petition} ~~in or to~~ ^{H.S.L. as trustee} ~~any of the property of the debtors,~~ have been adjudicated herein by the order and decision heretofore made and entered on the petition of Pacific States Corporation, a corporation ^{on May 18, 1945 H.S.L.} ~~on May 18, 1945 H.S.L.~~ and said adjudication is final.

II.

That the petition for dismissal and the motion for dismissal and the motion to strike filed herein by the Citizens National Trust and Savings Bank of Los Angeles should be denied.

January 4 H.S.L.
Dated: ~~December~~ 29, 1943.

H. SIDNEY LAUGHLIN

Conciliation Commissioner of Los Angeles County

Approved as to Form:

C. P. VON HERZEN and
GOUDGE, ROBINSON & HUGHES

By
Attorneys for Debtors

RICHARD L. NORTH

Attorney for Pacific States Corporation

DERTHICK, CUSACK & GANAHL

By W. J. Cusack

Attorneys for Citizens National Trust & Savings
Bank of Los Angeles

[Endorsed]: Filed Jan. 29, 1944. Conciliation Commissioner.

[Title of District Court and Cause]

ORDER DISMISSING PETITION FOR DISMISSAL,
DENYING MOTION TO STRIKE FROM
PETITION AND SCHEDULES AND DENYING
MOTION TO DISMISS

The petition of Citizens National Trust & Savings Bank of Los Angeles, together with its motion to strike from petition and schedules, and motion to dismiss, coming on regularly for hearing on the 27th day of September, 1943, before the Honorable H. Sidney Laughlin, Conciliation Commissioner of Los Angeles County, the petitioner and movant, Citizens National Trust & Savings Bank of Los Angeles, appearing by its counsel, Messrs. Derthick, Cusack & Ganahl, by W. J. Cusack, Esq., and the creditor, Pacific States Corporation, appearing by its counsel, Richard L. North, Esq., and the debtors appearing in person and by their counsel, Messrs. Goudge, Robinson & Hughes and David A. Sondel and C. P. Von Herzen, Esquires, and evidence, both oral and documentary, having been submitted, and the matter having

been argued, and the Commissioner being fully advised in the premises, now makes his Order, as follows:

It Is Ordered and Adjudged that the petition for dismissal of the Citizens National Trust & Savings Bank of Los Angeles, be and the same is hereby dismissed;

It Is Further Ordered and Adjudged that the motion to strike from petition and schedules made herein by the movant, Citizens National Trust & Savings Bank of Los Angeles, be and the same is hereby denied;

It Is Further Ordered and Adjudged that the motion to dismiss, made herein by the movant, Citizens National Trust & Savings Bank, be and the same is hereby denied.

January 4.

Dated: ~~October 29, 1943~~

H. SIDNEY LAUGHLIN

Conciliation Commissioner of Los Angeles County

Approved as to Form:

Messrs. DERTHICK, CUSACK & GANAHL

By W. J. Cusack

Attorneys for Citizens National Trust &
Savings Bank

RICHARD L. NORTH

Attorney for Pacific States Corporation

GOUDGE, ROBINSON & HUGHES and

DAVID A. SONDEL and C. P. VON HERZEN

By C. P. Von Herzen

Attorney for Debtors

[Endorsed]: Filed Jan. 29, 1944. Conciliation Commissioner.

In the District Court of the United States
Southern District of California
Central Division

No. 41731-PH

In the Matter of

FRANK D. HALL and MARGUERITE S. HALL,
Husband and Wife,

Debtors.

PETITION FOR REVIEW OF DECISION OF
CONCILIATION COMMISSIONER

To: H. Sidney Laughlin, Esquire, Conciliation Commissioner :

The petition of the Citizens National Trust & Savings Bank respectfully shows:

This is a proceeding instituted by the above named debtors under Section 5 of the National Bankruptcy Act of 1898 as amended in 1942. The debtors filed their original petition on December 9, 1942 and an amended petition on June 4, 1943. The present proceedings involve three matters presented by the Citizens National Trust & Savings Bank of Los Angeles and heard by the Conciliation Commissioner on the 27th of September, 1943. Such proceedings were:

1. A motion to dismiss the proceeding upon the ground that neither of the debtors is a farmer.
2. A petition for dismissal upon the ground that the petitioner and not the debtors was the owner of the real property described in the bankruptcy petition.

3. A motion to strike the description of such real property from the schedules.

In a prior proceeding herein, a petition for dismissal was filed by Pacific States Corporation, a corporation, which petition alleged that the debtors were not farmers within the Act and that the debtors were not the owners of the real property referred to and described in the petition. A hearing was had on the petition of the Pacific States Corporation before the Conciliation Commissioner and there was an adjudication to the effect that the debtors were farmers and the owners of the real property and an order to that effect was made on or about the 18th of May, 1943. The Citizens National Trust & Savings Bank was not a party to that proceeding.

In the instant case an order was made and entered on January 29, 1944 denying relief to the moving party and petitioner Citizens National Trust & Savings Bank upon the ground that the matters set out in the two motions and the petition above referred to had been adjudicated and the petitioner herein was bound by such adjudication.

ERRORS COMPLAINED OF

1. The court erred as a matter of law in refusing to admit in evidence Petitioner's Exhibits 1 to 6 inclusive showing the status of the title to the realty involved in this proceeding, being the following:

Exhibit 1: A grant deed from the debtors Frank D. Hall and Marguerite S. Hall to Farm Home Builders, a corporation, covering the property in question.

Exhibit 2: A grant deed from Pan American Bank, a corporation to the Citizens National Trust & Savings Bank.

Exhibit 3: A grant deed from Pan American Bank, a corporation to the Citizens National Trust & Savings Bank, conveying reversionary interest in the land in question.

Exhibit 4: A declaration of trust No. 5873, and

Exhibit 5: A declaration of trust No. 5902, both executed by the Citizens National Trust & Savings Bank and covering the property in question.

Exhibit 6: A deed of trust covering the real property involved.

2. The court erred in striking from the record the testimony of O. E. Horstman, a witness on behalf of petitioner, which testimony showed the advancements made by petitioner to the trust covering the real property involved and the payment of which advancements was secured by the terms of the trust and the amount owing to petitioner.

3. The court erred as a matter of law in sustaining the objection of the attorney for the debtors to any and all testimony of Frank D. Hall called as a witness on behalf of petitioner, pertaining to his farming activities.

4. The court erred in sustaining the objection to any and all testimony of Marguerite S. Hall, which evidence was offered on behalf of petitioner, pertaining to the farming activities of herself and husband.

5. The court erred as a matter of law in finding that the Citizens National Trust & Savings Bank was bound

by all proceedings theretofore taken by Pacific States Corporation, a corporation.

6. The court erred in its conclusions of law from the evidence that the matter set out in the two motions and petition of petitioner herein had been adjudicated by the order and decision theretofore made and entered on the petition of Pacific States Corporation.

7. The court erred as a matter of law in dismissing the petition of Citizens National Trust & Savings Bank for dismissal of these bankruptcy proceedings.

8. The court erred in denying petitioner's motion to strike the description of the real property from the petition and schedules of the debtors.

9. The court erred in denying the motion of Citizens National Trust & Savings Bank to dismiss the petition herein, which motion was based upon the ground that neither of the petitioners were farmers.

Wherefore, petitioner prays for a review of said orders by the District Court and that said orders be vacated and set aside.

Dated: February 7, 1944.

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES

By N. E. Mudge

Petitioner. Vice President & Trust Officer
DERTHICK, CUSACK & GANAHL

By Wm. J. Cusack

Attorneys for Petitioner

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 8, 1944. Conciliation Commissioner.

In the District Court of the United States
Southern District of California
Central Division
No. 41731 O'C

In the Matter of FRANK D. HALL and MAR-
GUERITE S. HALL, Husband and Wife,
Debtors.

ORDER AFFIRMING CONCILIATION
COMMISSIONERS ORDER

C. P. Von Herzen, Esquire, and David A. Sondel, Esquire,
and Edgar P. Hudes, Esquire, Attorneys for
Debtors.

Derthick, Cusack and Ganahl, Attorneys for the Petitioner,
Citizens National Trust & Savings Bank.

Memorandum Opinion by the Court

The Court has carefully considered the Petition for Review from the decision of the Conciliation Commissioner dated May 18th, 1943 and the arguments of Counsel for the respective parties heard May 15th, 1944 and has examined the authorities submitted and having reviewed the entire file is of the opinion that the Order of the Commissioner should be affirmed:

Therefore it ordered, adjudged and decreed that the Order and Judgment of the Conciliation Commissioner be and the same is hereby affirmed. Exception allowed Petitioner.

Dated at Los Angeles, August 29th, 1944.

J. F. T. O'CONNOR
United States District Judge

Judgment entered Aug. 29, 1944. Docketed Aug. 29, 1944. C. O. Book 27, page 521. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

[Endorsed]: Filed Aug. 29, 1944.

[Title of District Court and Cause]

STIPULATION FOR SUPPLEMENTING OF RECORD

It Is Hereby Stipulated and Agreed between appellant, Pacific States Corporation, through George T. Coggin, its attorney, and Frank D. Hall and Marguerite S. Hall, Appellees, through C. P. Von Herzen, Edgar F. Hughes and David A. Sondel, their attorneys, that the following papers and exhibits in the within case be certified and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as a supplement to the record heretofore transmitted and that the original documents and exhibits may be transmitted in lieu of copies. The costs and expenses in connection with the printing, certifying, etc. of the matters contained in this stipulation shall be paid for by the debtors, Frank D. Hall et al., but with ultimate costs of the appeal to be borne by the losing party. The papers and exhibits as follows:

1. Petition of Pacific States Corporation to dismiss the debtor's original petition. Dated January 14, 1943.
2. Order of Commissioner, dated May 18, 1943, denying petition of Pacific States Corporation to dismiss.
3. Petition of Citizens Nat. Trust & Savings Bank to dismiss. Filed Sept. 14, 1943.
4. Motion of Citizens Nat. Trust & Savings Bank to dismiss. Filed Sept. 14, 1943.
5. Notice of motion to strike, etc. filed Sept. 14, 1943 by Citizens Nat. Trust & Savings Bank.
6. Findings and conclusions of the Commissioner in denying the motions and petitions of Sept. 14, 1943. Dated January 29, 1944.

7. Order of January 29, 1944 dismissing the motions and petitions of Sept. 14, 1943.

8. Petition of Citizens Nat. Trust & Savings Bank for review of order of Jan. 29, 1944. Dated Feb. 7, 1944.

9. Order of Judge O'Connor affirming the Commissioner's order of Jan. 29, 1944. Dated August 29, 1944.

10. Exhibits marked as follows: Debtor's Exhibits 2-7 and those portions of Debtor's Exhibit 2-4 not already transmitted to the said United States Circuit Court of Appeals.

Dated: March 27, 1947.

GEORGE T. GOGGIN

Attorney for Pacific States Corporation

C. P. VON HERZEN

EDGAR F. HUGHES and

DAVID A. SONDEL

Attorneys for Frank D. Hall and

Marguerite S. Hall

[Title of District Court and Cause]

ORDER APPROVING SUPPLEMENTARY
RECORD

Good Cause Appearing Therefor the attached stipulation is approved and it is ordered that the papers and exhibits enumerated therein be certified by the clerk of this court and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: March 28, 1947.

WM. C. MATHES

Judge of the United States District Court

[Endorsed]: Filed Mar. 29, 1947.

[Title of District Court and Cause]

CERTIFICATE OF CLERK TO SUPPLEMENTAL
TRANSCRIPT

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages contain the original Certificate of Conciliation Commissioner on Review; Petition for Review of Decision of Conciliation Commissioner; Petition for Dismissal; Motion to Dismiss; Notice of Motion to Strike from Petition and Schedules; Findings of Fact and Conclusions of Law; Order of Conciliation Commissioner Dismissing Petition for Dismissal, Denying Motion to Strike from Petition and Schedules and Denying Motion to Dismiss; Order of Conciliation Commissioner upon Petition for Dismissal; Supplemental Referee's Certificate of Petition for Review; Petition for Dismissal; Order of District Judge Affirming Conciliation Commissioner's Order; the remainder of Debtor's Exhibit No. 2-4; and Debtor's Exhibit 2-7, all in the above entitled matter and a full, true and correct copy of Stipulation and Order for Supplementing of Record which constitute the supplemental transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 31st day of March, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Endorsed]: No. 11527. United States Circuit Court of Appeals for the Ninth Circuit. Pacific States Corporation, Appellant, vs. Frank D. Hall and Marguerite S. Hall, Appellees. Supplemental Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed April 3, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.





